82-217

No.

Office - Supreme Court, U.S.
FILED
AUG 6 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SHIRLEY STOVER, *et al.*,
Petitioners

v.

MELANIE HANSON JOHNSON,
GERARD STANLEY JOHNSON, *et al.*, and
JACQUELINE N. RAU,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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with respect to all matters pertaining to class certification,

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QUESTIONS PRESENTED

1. Does an order entered by a federal district court certifying a mandatory class action under Fed. R. Civ. P. 23(b)(1) enjoin potential or pending state court suits and thus qualify as an injunction appealable immediately under 28 U.S.C. § 1292(a)(1)?

2. Does the Anti-Injunction Act, 28 U.S.C. § 2283, take away a federal district court's power to certify a mandatory class action once a member of the class has filed an individual suit in state court, even if a class action is necessary to ensure fairness among all class members?

LIST OF PARTIES

Parties to the proceedings in the Eighth Circuit were: Shirley Stover and all other class members similarly situated *†; The Honorable Scott D. Wright, United States District Court Judge for the Western District of Missouri †; Jacqueline N. Rau *; Melanie Hanson Johnson, Gerard Stanley Johnson, and other state court plaintiffs similarly situated.†

Crown Center Redevelopment Corp., Hallmark Cards, Inc., Hyatt Corp. and Hyatt Hotels Corp., and the Plaintiffs' Liaison Committee participated as *amici curiae*.

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* Party to No. 82-1207, Appeal of Jacqueline N. Rau.

† Party to No. 82-1181, Petition for Mandamus of Melanie Hanson Johnson and Gerard Stanley Johnson, *et al.*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Shirley Stover, the representative plaintiff, and the class of all business invitees present at the Kansas City Hyatt Regency Hotel disaster on July 17, 1981 pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on June 7, 1982.

OPINIONS BELOW

The opinion of a panel (2-1) of the Court of Appeals for the Eighth Circuit, vacating the District Court's certification order, is reproduced as Appendix A. The opinion of the United States District Court for the Western District of Missouri granting class certification is reported at 93 F.R.D. 415; the opinion and accompanying order are reproduced as Appendix D.

JURISDICTION

The judgment of the Eighth Circuit was entered June 7, 1982. Rehearing *en banc* was denied 3-3, one judge abstaining, on July 9, 1982. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

1. 28 U.S.C. § 1292(a)(1) provides:

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

2. 28 U.S.C. § 2283 provides:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

3. Federal Rule of Civil Procedure 23, respecting class actions, is reproduced in its entirety as Appendix E.

STATEMENT

On Friday, July 17, 1981, during the weekly tea dance at the Hyatt Regency Hotel in Kansas City, Missouri, two skywalks suddenly collapsed, killing 114 persons and injuring hundreds more. On the next business day, Monday, July 20, 1981, three suits were filed against various parties responsible for the design and construction of the

skywalks.[1] Two of these suits were filed in Missouri state court. The following day, two additional suits were filed.[2] Within six months of the disaster, approximately 150 suits had been filed in Missouri state court and the United States District Court for the Western District of Missouri, seeking over $1 billion in compensatory damages and $500 million in punitive damages. Several defendants asserted in their answers that multiple punitive awards based on the same conduct would violate Missouri law and the constitutional guarantee of due process.[3]

On September 1, 1981, one of the victims, Molly Riley, filed a complaint in the Western District of Missouri and requested that the court certify a Rule 23 class consisting of the 1500 to 2000 business invitees present in the lobby of the hotel when the skywalks collapsed. Jurisdiction was asserted on the basis of diversity, 28 U.S.C. 1332. A month later, defendant Hyatt Corporation asserted that "the damages sought in the lawsuits which have already been filed far exceed the total amount of insurance coverage available under all the insurance policies issued by all of defendants."[4] The defendants' responses to interrogatories also showed that the net worth of several contractors respon-

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[1] *Moberg, et al.* v. *Crown Center Redevelopment Corp.* et al., No. 81-0593-CV-W-3 (W.D.Mo.); *Savage et al* v. *Crown Center Redevelopment Corp. et al.*, No. CV81-15245 (C.Ct. Jackson Cty., Mo.); *Willia[illegible]* v. *Crown Center Redevelopment Corp.* et al., No. CV81-15244 (C. Ct. Jackson Cty., Mo.).

[2] *Alcala* v. *Crown Center Redevelopment Corp. et al.*, No. 81-0606-CV W-4 (W.D. Mo.); *Rhodes* v. *Crown Center Redevelopment Corp. et al* No. CV81-15310 (C.Ct. Jackson Cty., Mo.).

[3] *See, e.g.*, Answers of Hallmark Cards, Inc. and Crown Center Redevelopment Corp., October 8, 1981.

[4] Petition for Declaratory Judgment and Incidental Relief, *Hyatt Corp.* v. *Occidental Fire & Casualty Co. of North Carolina et al.*, No. CV81-22009 (C.Ct. Jackson Cty, Mo., Oct. 2, 1981), at 9.

sible for building the skywalks was minimal or negative.[5] The risk of insufficient funds to pay compensatory damage judgments and any funds at all for punitive damages became apparent.

On January 25, 1982, the District Court certified a mandatory class action under Rule 23(b)(1) on three issues: (1) compensatory liability, (2) punitive liability; and (3) amount of punitive damages. The court held that a classwide adjudication of punitive damages was necessary because the defendants' assets might be insufficient to satisfy all claims and because there is "uncertainty under Missouri law as to whether a single defendant can be liable for more than one award of punitive damages." (A. 53a)[6] Absent a class action, early-suing plaintiffs might well exhaust the defendants' assets or obtain punitive damage awards that would preclude or cut back such awards in subsequent suits. As to liability for compensatory damages, the court held that a class action was appropriate to avoid "wasteful repetitive litigation" and inconsistent results. (A. 49a-50a)[7] Shirley Stover, whose husband had died in the collapse and who had suffered serious personal injuries, was selected as the class representative.

The court ruled that the compensatory damages recoverable by each class member would be determined individually and not in the class action. Although the class action was certified under Rule 23(b)(1), which does

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[5] For example, Gillum-Colaco, the structural engineer responsible for the skywalks, reported a negative net worth.

[6] References cited as "A." refer to the pages of the Appendices bound with this Petition.

[7] The court also emphasized that failure to certify a class action would leave those attorneys who represent more than one victim with a conflict of interest. (A. 54a) Those attorneys, of whom there are several, would be "forced to decide which case to proceed with first" in the context of both a potentially limited fund and the negative effect that a punitive damage verdict obtained for one client would have in a subsequent trial on behalf of another client. *Id.*

not permit class members to opt out of the class, the court provided that class members could "settle their respective claims against any or all defendants" on an individual basis. (A. 41a) [8]

The District Court did not enjoin class members from pursuing individual suits in either state or federal court.[9] Accordingly, on February 2, 1982, certain plaintiffs who had opposed class certification filed a motion to proceed in state court notwithstanding the class action. Subsequently, however, these plaintiffs indicated to the state court that they "did not want that motion set down for a hearing . . ., but wanted the matter deferred." [10]

Indeed, in this case, the state court proceedings halted, not as a result of federal compulsion, but rather because the plaintiffs whose suits were pending in state court informed the judge presiding over the suits that they wanted the matter deferred pending a ruling by the Eighth Circuit. Shortly before the panel's decision, those plaintiffs changed their mind and requested permission to proceed. They explicitly recognized that the state court "ha[d] not been enjoined, [that] these proceedings have not been stayed . . . ." Transcript of Proceedings, *In re Skywalk Cases*, No. CV81-15244 MCF, Civ. Docket I (C. Ct. Jackson Cty., Mo., June 1, 1982), at 22. On June 3, 1982, four days before the panel's decision, the request to proceed was granted by the state court.

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[8] *See also*, A. 47a (class members' "interest in settling their claims . . . is not restricted by this order").

[9] Prior to the certification of the class, the District Court had indicated that it would not be necessary to enjoin the state proceedings:

> "Well, I don't think that's going to be a problem because I don't think that's even going to come up." Transcript of Dec. 10, 1981, Hearing Before the Honorable Scott O. Wright at 76.

[10] The quotation is from a state court order of June 3, 1982 (p. 1), which noted that the last pleading on this subject was filed on February 24, 1982.

On February 8, 1982, class members Melanie Stanley Johnson and Gerard Stanley Johnson filed a petition for a writ of mandamus in the Court of Appeals for the Eighth Circuit, seeking to set aside the class action and to compel the District Court to disqualify itself.[11] On February 9, 1982, class member Jacqueline N. Rau filed an interlocutory appeal and, in the alternative, a petition for mandamus, requesting the same relief. The cases were consolidated by the Eighth Circuit. Petitioners here, the representative plaintiff and the class, opposed the petitions and the appeal.

The federal panel rendered its decision on June 7, 1982. (A. 1a) The panel held (2-1) that the class certification order constituted an injunction appealable as of right under 28 U.S.C. § 1292(a)(1) and barred by the Anti-Injunction Act. (A. 2a-16a) Without questioning the need for a class action, the majority ruled that the Anti-Injunction Act bars mandatory class actions unless they are certified before any class member files an individual suit in state court. *Id.*

Judge Heaney dissented. In a 22-page opinion, he emphasized that "the approach adopted by the majority . . . broadly forecloses mandatory class actions whenever a class member has commenced state court proceedings." (A. 37a) He disagreed squarely with the majority's view of the Anti-Injunction Act. Relying upon the exception for injunctions "necessary in aid of" jurisdiction, Judge Heaney remarked that "it seems self-evident that an injunction to protect the ordinary scope of a mandatory class action is 'necessary in aid of' the federal jurisdiction over such a class" and therefore proper. (A. 34a) Judge Heaney also pointed out that "there are unusually strong reasons for certifying the mandatory class here," and that "no plaintiff has, as yet, been enjoined from pursuing any state court action." (A. 34a).

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[11] The grounds asserted in support of disqualification are not pertinent to this petition. The panel unanimously agreed that there was no basis for disqualification. (A. 16a-17a)

On July 9, 1982, by an equally divided vote (3-3), the Eighth Circuit denied petitioners' petitions for rehearing and rehearing *en banc*.[12] (A. 38a)

REASONS FOR GRANTING THE WRIT

This case presents issues that will have a significant impact on two important areas of federal procedure.

First: *Interlocutory Appellate Review.* The effect of the Eighth Circuit's opinion is to render virtually all orders certifying mandatory class actions subject to interlocutory appeal as of right by any class member on the theory that they constitute implicit injunctions. If allowed to stand, this unprecedented ruling would create a new exception to the final judgment rule and would severely undermine the long-standing policy against piecemeal appellate review.

Second: *Mandatory Class Actions.* The panel decision eviscerates mandatory class actions in the federal courts. The Eighth Circuit's decision holds that federal court cannot certify a mandatory class action once a class member has filed an individual suit in state court, regardless of the inequity that would result from individual suits. If allowed to stand, the majority's novel ruling would, for all practical purposes, eliminate federal mandatory class actions by permitting one individual, simply by arriving at a state courthouse first, to deprive a federal court of the power to entertain a mandatory class action.

I. ORDERS CERTIFYING MANDATORY CLASS ACTIONS DO NOT CONSTITUTE INJUNCTIONS AND ARE NOT APPEALABLE AS OF RIGHT.

Review by this Court is appropriate to examine the panel's unprecedented holding that the certification of a mandatory class action, standing alone, constitutes an in-

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[12] Chief Judge Lay, Judge Heaney and Judge Bright voted to grant rehearing *en banc*. Judge John R. Gibson did not participate in the consideration of the petition.

junction and is therefore appealable as of right under 28 U.S.C. § 1292(a)(1).

No injunction issued here. "[N]o plaintiff has, as yet, been enjoined from pursuing any state court action." (A. 34a) (Heaney, J., dissenting) And nothing in Rule 23 states that certification of a mandatory class action constitutes an injunction. The Rule provides only that the judgment in such a class action will include all class members. *See* Fed. R. Civ. P. 23(c)(3). As Wright & Miller opine, this does not necessarily mean that it will bind all the persons named as class members. *See*, 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1789 at 176 (1972). A class member is free to pursue a separate suit in state court, notwithstanding the class certification, assuming that neither the state court nor the federal court were to interfere by a *subsequent* stay of the state proceedings. *See In re Glen W. Turner Enterprises Litigation*, 521 F.2d 775 (3d Cir. 1975).

Certification simply does not constitute an order prohibiting the class member from proceeding with his own action. The priority between a state court judgment and any judgment entered in the federal class action would be determined by the doctrine of *res judicata*.

Obviously, once a mandatory class action has been certified, it may make little sense for class members to proceed with individual suits, or for the courts in which those suits are pending to permit them to do so. But that does not mean that the initial certification of a class action constitutes an injunction.

We are not aware of any case, and the panel decision cites none, in which certification of a mandatory class action has been treated as an injunction appealable as of right under 28 U.S.C. § 1292(a)(1). Furthermore, the panel's decision is inconsistent with the reasoning of two recent and unanimous Supreme Court decisions. In *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478, 482 (1978), this Court emphasized that § 1292(a)(1)

"does not embrace orders that have no direct or irreparable impact on the merits of the controversy." An order certifying a class action has no irreparable consequences and is therefore outside the ambit of § 1292(a)(1). As this Court stated in a case decided the same day as *Gardner*, "a district court's order denying or granting class status is inherently tentative." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 n.11 (1978).[13] Such a preliminary procedural determination cannot be regarded as the grant or denial of an injunction. While the District Court's order "may have a significant effect on the litigation, '[m]any interlocutory orders are equally important, . . . but they are not for that reason converted into injunctions.'" *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. at 481 (citation omitted).

To assert jurisdiction by labeling a class certification an injunction is to circumvent "the congressional policy against piecemeal appeals." *Switzerland Cheese Assn., Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966). As this Court has stated:

> "Moreover, allowing appeals of right from nonfinal orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final judgment rule—'that of maintaining the appropriate relationship between the respective courts . . . .' This goal, in the absence of most compelling reasons to the contrary, is very much worth preserving." *Coopers & Lybrand*, 437 U.S. at 476.

Indeed, the interpretation set forth by the panel would apply whether there was a pending or potential individual suit in state *or* federal court; either would be "enjoined" from proceeding once a mandatory class had been certified. It would also apply equally to a *denial*

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[13] "By the very language of the rule, any order rendered by the district court regarding the maintenance of the class action may be considered conditional, and may be altered or amended before any decision on the merits.' Fed. R. Civ. P. 23(c)(1)." *In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213, 215 (8th Cir.), *cert. denied*, 423 U.S. 947 (1975).

of a mandatory class action. The denial would be considered the refusal of an injunction and thus directly appealable on an interlocutory basis. This, of course, is contrary to this Court's holding in *Coopers & Lybrand*, *supra*.

Given the strict limitations that this Court has imposed on interlocutory appeals under 28 U.S.C. § 1292(a)(1), the panel's ruling that an order certifying a mandatory class action constitutes an appealable injunction is an unwarranted expansion of appellate jurisdiction.

II. THE PENDENCY OF AN INDIVIDUAL SUIT IN STATE COURT CANNOT STRIP A FEDERAL COURT OF THE POWER TO TRY A MANDATORY CLASS ACTION.

A. The Panel's Decision Eviscerates Federal Rule of Civil Procedure 23.

The panel's decision adopts "a rule which broadly defeats the purpose of mandatory class action jurisdiction." (A. 37a) (Heaney, J., dissenting). The decision holds that by virtue of the Anti-Injunction Act, 28 U.S.C. § 2283, the filing of an individual suit in state court deprives a federal court of the power to try a mandatory class action. A single member of the class can prevent a mandatory class action simply by commencing a state proceeding first.

As a practical matter, this decision will drastically restrict the power of the federal courts to certify any of the mandatory class actions authorized by Rule 23, except in the relatively rare case where exclusive jurisdiction vests in the federal court.[14] It is highly unlikely that a federal

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[14] Fed. R. Civ. P. 23 authorizes class actions in three situations. First, where individual suits would prejudice the interests of the members of the class, Rule 23(b)(1)(B), or the interests of the party opposing the class, Rule 23(b)(1)(A). Second, where the party opposing the class has acted or refused to act on grounds generally applicable to the class. Rule 23(b)(2). Third, where questions of law or fact common to the class predominate over individual

court could, with respect to class certification, permit appropriate discovery, receive any briefs interested parties may file, hold a hearing on the matter, and certify a class action, all before a single member of the class files a complaint in state court. In this case, it would have been truly impossible to certify a mandatory class action, since the first state court action was filed on the first business day after the hotel disaster. Indeed, it was the very existence of many individual actions, both state and federal, which enabled the court to determine that a class action was needed to protect the interests of all injured persons and to insure that no one person's recovery affected or precluded another's.

There can be no more compelling case for a mandatory class action than the situation in which tortfeasors lack sufficient funds to satisfy all the claims of the victims. Without a class action, recovery for wrongs done may be determined not by the merits of claims, but by "an unseemly race to the courtroom door with monetary prizes for [the] winners and worthless judgments for the rest." *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45 (E.D. Ky. 1977), *petition for mandamus denied*, 588 F.2d 543, 544 (6th Cir. 1978), *cert. dismissed*, 443 U.S. 913 (1979).

The framers of Rule 23 foresaw the need for a procedural device to prevent so inequitable a result. Rule 23(b)(1)(B) provides that a federal court may certify a mandatory class action if individual suits would threaten the interests of the members of the class. The Advisory Committee that drafted the Rule recognized that this would "plainly [be] the case when claims are made

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questions and a class action would be the best means of adjudicating the controversy. Rule 23(b)(3).

Class members are not permitted to opt out of the class in the first two situations, for the fundamental reason that a unitary adjudication is essential to achieve the purposes of the class action. Rule 23(c)(3). Class members are allowed to opt out a Rule 23(b)(3) class action because by doing so they do not frustrate the class action. Rule 23(c)(2).

The panel's decision bars certification of either of the first two types of class actions once a class member files suit in state court.

by numerous persons against a fund insufficient to satisfy all claims." Advisory Committee's Note to Federal Rule of Civil Procedure 23, 39 F.R.D. 98, 101 (1966).[15]

Here, the panel set aside a class certification even though it in no way questioned the District Court's conclusion that such a proceeding was needed to prevent "the sacrifice of one aggrieved party's claim for the sole benefit of another aggrieved party," (A. 58a) The majority noted the District Court's concern for the efficient management of mass tort litigation and commended "his creative efforts in attempting to achieve a fair, efficient and economical trial for the victims of the Hyatt Regency disaster." (A. 18a) Judge Heaney, in his dissent, echoed similar praise.

> "In sum, the district court's class action satisfies all the requirements of Rule 23, and the state and fed-

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[15] The district court in the "Dalkon Shield" litigation, for just such reasons, certified a nationwide class on punitive damages and a statewide (California) class on liability for compensatory damages. *In Re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 521 F. Supp. 1188 (N.D. Cal. 1981). The certification was vacated by the United States Court of Appeals for the Ninth Circuit on June 18, 1982. Nos. 81-4648 et al., slip op. (9th Cir., June 18, 1982). None of the reasons for the reversal are applicable to the Hyatt Hotel disaster litigation. The Ninth Circuit held that: (1) no testimony was taken to determine the existence of a limited fund available to pay damage awards. Here discovery was taken. The court held a hearing where it received this information plus additional data. (2) The punitive damage standards of fifty different jurisdictions were applicable. There, only the standard in Missouri applies. (3) There was no representative plaintiff and no one ever sought the role. Not true here. Molly Riley moved for certification and Shirley Stover was named the representative plaintiff. (4) The designated lead counsel resigned and the availability of adequate lead counsel remained an open question. Experienced lead counsel are handling this case. (5) The conduct of the defendant differed in time, quality and quantity with regard to each class member. All class members here suffered as a result of a common disaster, on one date, whose cause is identical for every claimant. (6) There were discrete affirmative defenses which may or may not have applied to the class members. Here, none exist with respect to the Hyatt Hotel disaster.

> eral constitutions. Moreover, certification of a class action would promote judicial economy in a complex case where such concerns are especially significant. It would protect the interests of defendants by avoiding relitigation and inconsistent determinations of their relative liability. And it would protect the plaintiffs by ensuring prompt determination of liability (thereby promoting settlements) and by guaranteeing that any punitive damage award would be fairly allocated to all plaintiffs. (A. 82a)

In short, in the face of a need, recognized by all, for a class action, the panel's majority allowed a mandatory class action to be defeated by the very race to the courthouse the rule was designed to prevent. As the dissent noted, this is "simply the wrong rule in light of the necessary dictates of mandatory class actions." (A. 33a)

B. The Certification of a Mandatory Class Action To Protect a Limited Fund Is Necessary in Aid of The Federal Court's Jurisdiction.

The panel's decision is not supported by the Anti-Injunction Act or by "any sensible view of the relations between state and federal courts." (A. 37a) (Heaney, J., dissenting).

Although the Anti-Injunction Act generally bars injunctions against state court proceedings, it exempts from its ambit injunctions issued by a court "where necessary in aid of its jurisdiction . . . ." 28 U.S.C. § 2283. This Court has recognized that a federal court may enjoin state proceedings where essential to permit it "[t]o exercise its jurisdiction freely and fully," *Capital Service, Inc.* v. *NLRB*, 347 U.S. 501, 506 (1954), or where "necessary to prevent a state court from so interfering with [its] consideration or disposition of a case as to seriously impair [its] flexibility and authority to decide that case." *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970).

Trying all claims in one proceeding is no less necessary in a mandatory class action under Rule 23 than in inter-

pleader under Federal Rule of Civil Procedure 22. In that latter situation, it is well established that an injunction may issue to bar the claimants from proceeding with pending state suits. *See, e.g., United States* v. *Major Oil Corp.*, 583 F.2d 1152, 1158 (10th Cir. 1978); *Pan American Fire & Casualty Co.* v. *Revere*, 188 F. Supp. 474, 485 (E.D. La. 1960) ("If the court had no power to enjoin concurrent state court proceedings, the grant of interpleader would often create more problems than it solved."); *Jefferson Standard Life Insurance Co.* v. *Smith*, 161 F.Supp. 679, 681 (E.D.S.C. 1956). *See also Texas* v. *Florida*, 306 U.S. 398, 412 (1939). Although Congress has expressly authorized injunctions only in statutory interpleader actions under 28 U.S.C. § 1335, *see* 28 U.S.C. § 2361, the courts have not deemed this critical and have issued injunctions in Rule 22 interpleader actions as well.

Just as Rule 22 interpleader lies where a stakeholder "is or may be exposed to double or multiple liability," a mandatory class action will be certified where claimants are or may be faced with a limited fund. And just as Rule 22 interpleader protects a stakeholder from the threat of multiple claims in numerous individual suits, a Rule 23(b)(1) class action protects claimants from the risk that the defendants' assets will be exhausted by numerous individual suits. Claimants such as the victims of the Hyatt disaster are no less in need of protection than a stakeholder, and a federal court can have no less power to provide them the protection they need.

If the class certification here constituted an injunction—which it did not—such an injunction was "absolutely necessary to the district court's jurisdiction." (A. 35a) (Heaney, J., dissenting). To hold otherwise would be to eliminate mandatory class actions in all instances save one—where the class action is exclusively federal. If this is all that is left of Rule 23, this Court, and not a single, deeply divided court of appeals, should say so.

CONCLUSION

Class counsel have engaged in extensive discovery for over eight months. Dozens of depositions have been taken. Thousands and thousands of documents have been read, analyzed, and indexed. The discovery continues while this Petition is pending. Trial on all class issues is close at hand. Accordingly, the petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the Eighth Circuit.

Respectfully submitted,

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August, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1181

IN RE: FEDERAL SKYWALK CASES
IN RE: MELANIE HANSON JOHNSON and
GERARD STANLEY JOHNSON, *et al.*,
Petitioners,

No. 82-1207

IN RE: FEDERAL SKYWALK CASES
JACQUELINE N. RAU,
Appellant,

Petition for Mandamus/Application for
Immediate Temporary Stay

Appeal from the United States District Court
for the Western District of Missouri

Submitted: March 12, 1982

Filed: June 7, 1982

Before HEANEY, MCMILLIAN and ARNOLD, Circuit Judges.

McMILLIAN, Circuit Judge.

This action challenges the validity of a mandatory class certification order rendered by the United States District Court [1] for the Western District of Missouri during the course of litigation arising out of the collapse of two skywalks at the Hyatt Regency Hotel in Kansas City, Missouri in July, 1981.[2] The class was certified on the issues of liability for compensatory and punitive damages and amount of punitive damages, and includes all business invitees at the hotel during the disaster.

Two objecting plaintiffs (objectors) now petition this court to vacate the order and disqualify the federal district judge asserting jurisdiction under 28 U.S.C. § 1292 (a) (1), or alternatively, under mandamus.[3] In response the class representative argues that the order is interlocutory thereby precluding appellate review. Alternatively, the class representative argues that the federal district judge did not abuse his discretion in certifying the class and further that the class is appropriate.[4] For the reasons discussed below, we conclude that we do have jurisdiction under 28 U.S.C. § 1292(a)(1) and further that the order must be vacated because it violates the

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[1] The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

[2] *In re Federal Skywalk Cases*, No. 81-0753 CV-W-3 (W.D. Mo. Jan. 25, 1982).

[3] The individual plaintiff designations are *In re Jacqueline N. Rau* and *In re Melanie Hanson Johnson*. In addition, defendants Crown Center Redevelopment Corp., Hallmark Cards, Inc., Hyatt Corp. and the Plaintiffs' Liaison Committee participated as amici curiae. All amici curiae oppose class certification, but only the Plaintiffs' Liaison Committee seeks disqualification of the district judge.

[4] The class representative argues that class certification is an appropriate device to handle the claims arising out of the disaster. However, in view of our holding, we do not reach the merits of these arguments.

Anti-Injunction Act, 28 U.S.C. § 2283. We also conclude that 28 U.S.C. § 455(a) does not require the disqualification of the federal district judge.

On July 17, 1981, two skywalks in the central lobby of the Hyatt Regency Hotel in Kansas City, Missouri, collapsed killing 114 persons and injuring hundreds of others. Following the disaster numerous individual lawsuits were filed in both the Circuit Court for Jackson County, Missouri (state court), and the United States District Court for the Western District of Missouri (district court).[5] The federal district court jurisdiction was based on 28 U.S.C. § 1332, diversity of citizenship.

The state court cases were consolidated and assigned to Judge Timothy O'Leary. The federal cases were also consolidated and assigned to Judge Scott O. Wright. Shortly after the first cases were filed, the state and district court consolidated their respective cases for discovery. Each court appointed a Plaintiffs' Liaison Committee to aid in discovery and other matters. In addition, the two courts appointed a joint state-federal Plaintiffs' Liaison Committee to aid in the consolidated discovery.[6] Each court held pretrial conferences and issued pretrial orders concerning the scheduling of discovery.

Prior to the class certification, the Plaintiffs' Liaison Committee accomplished substantial discovery and trial preparation on behalf of all plaintiffs. The accomplishments included nearly completing the interrogatory phase of discovery and serving requests for production upon the defendants. In addition, the committee collected ap-

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[5] By the end of January, 1982, there were approximately 120 cases filed in state court and eighteen filed in district court. In addition, prior to the class certification, 123 claims had been settled at a total settlement cost of $18.5 million.

[6] The state court Liaison Committee consisted of twelve attorneys and the district court committee consisted of five attorneys. Three committee members were appointed by both courts and served on both committees.

proximately 300,000 documents pertaining to the litigation and had arranged for a document depository available to all plaintiffs' counsel. The committee had also arranged for the testing of the skywalk materials by the National Bureau of Standards. Brief In re Melanie Hanson Johnson, Appendix I "Affidavit of Patrick McLarney."

On October 27, 1981, Molly Riley, a district court plaintiff, filed a motion for class certification. The motion sought class certification under Fed. R. Civ. P. 23 (b)(I)(B), or in the alternative under 23(b)(3), as to the issues of liability for compensatory and punitive damages and the amount of punitive damages.[1] The basis

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[1] Fed. R. Civ. P. 23 provides in pertinent part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making

for requesting class certification was Riley's concern that there would be inadequate funds available to pay all claims for compensatory and punitive damages. Riley also moved that her counsel be appointed as lead counsel for the class.

Several federal and state court plaintiffs filed pleadings in opposition to Riley's motion. The objecting plaintiffs challenged Riley's and her attorney's qualifications to represent the class. They also challenged the need for and desirability of class action treatment arguing that there was no evidence of insufficient funds to satisfy all claims. A hearing was held before Judge Wright on December 10, 1981.

Prior to issuing the class certification order now on appeal, Judge Wright became aware that Riley could not serve as class representative because she was not of diverse citizenship from all defendants. Judge Wright then reviewed the complaints on file and determined that plaintiffs Stover, Johnson, Vrabel, Grigsby and Abernathy were diverse to all defendants.

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appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Class members in a 23(b)(3) class are free to "opt out" while, under the majority rule, class members in a 23(b)(1)(A) or 23(b)(1)(B) class cannot "opt out." *See Reynolds v. Nat'l Football League*, 584 F.2d 280 (8th Cir. 1978).

Thereafter, Judge Wright placed two telephone calls to Robert Collins, Stover's attorney, and inquired whether Stover would serve as class representative if a class was certified.[8] Judge Wright also stated that if Stover would agree to be class representative he would appoint Collins as assistant class counsel to Riley's attorney if a class was certified. Judge Wright and Collins agreed to speak again after Collins consulted with Stover. Collins thereupon called defense counsel and unsuccessfully attempted to settle Stover's claim. Stover then agreed to be class representative.

On January 19, 1982, counsel for the objecting plaintiffs moved, pursuant to 28 U.S.C. § 455(a), to disqualify Judge Wright based on his communications with Collins.

On January 25, 1982, Judge Wright entered the order appealed from in which he (1) denied Riley's motion for class certification because her citizenship was not diverse from all defendants, (2) certified a class action under Rule 23(b)(1)(A) on the issues of liability for compensatory and punitive damages, (3) certified a class action under Rule 23(b)(1)(B) on the issues of liability for punitive damages and the amount of punitive damages, (4) selected plaintiffs Stover, Vrabel, Grigsby and Abernathy as class representatives,[9] (5) selected Riley's counsel as lead counsel, and counsel for the class representatives as assistant class counsel, (6) denied the motion to

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[8] The content of the telephone conversations is disputed. Patrick McLarney, a state plaintiff's attorney, and Max W. Foust, a defendant's attorney, stated that Collins had told them that Judge Wright had told Collins he *was* going to certify a class and appoint Riley's counsel as lead counsel. In re Melanie Hanson Johnson Appendix Volume II Exhibits 13, 14, Affidavits of Max W. Foust and Patrick McLarney. Collins, however, states that Judge Wright only told him that he *might* certify a class. Appendix to Brief In Opposition to Petition for Mandamus Exhibit 6, Affidavit of Robert Collins.

[9] On February 1, 1982, Grigsby, Vrabel and Abernathy were deleted as class representatives because Grigsby had settled and Vrabel and Abernathy were not of diverse citizenship to Hyatt Corp.

disqualify himself under § 455(a), explaining that he called Collins as a matter of courtesy and had intended to call the lawyers for Johnson, Vrabel, Grigsby and Abernathy but did not do so because the motion to disqualify was filed, and further that he had not decided to certify the class until the order was drafted and entered, and (7) denied objectors' request to certify an interlocutory appeal under 28 U.S.C. § 1292(b). *In re Federal Skywalk Cases*, No. 81-0753 CV-W-3 (W.D. Mo. Jan. 25, 1982).

In support of its order the district court found that the general prerequisites for class actions prescribed by Rule 23(a) were satisfied, *id.* at 5-8, and that the specific requirements of Rule 23(b)(1) were also satisfied. The court stressed that the "interests of all parties concerned" would best be served by "the avoidance of wasteful, repetitive litigation," and that such litigation could be avoided by "trying the issues of liability for compensatory damages, liability for punitive damages and amount of punitive damages only once." *Id.* at 9.

In support of the Rule 23(b)(1)(A) class the court found that individual suits on the issues of liability for compensatory and punitive damages would create a risk of inconsistent results. *Id.* at 10.

In support of the Rule 23(b)(1)(B) class the court relied on three considerations. First, the defendants held liable for punitive damages might lack the funds to pay the full amount of such damages. *Id.* at 11. Second, individual suits for punitive damages would create a risk of unfairness to the other claimants because "there is some uncertainty under Missouri law as to whether a single defendant can be liable for more than one award of punitive damages."[10] *Id.* at 11. Third, the court noted

[10] It appears that the main concern underlying Judge Wright's certification is that there is an uncertain question of Missouri law as to whether plaintiffs may seek to recover multiple awards of punitive damages arising from a single wrongful act of a defendant.

that the prosecution of individual punitive damage actions could create an ethical problem for counsel representing more than one victim in that the counsel would be forced to decide which suit to bring first. *Id.* at 12.

On Februaary 9, 1982, the objectors filed their notice of appeal and petition for mandamus.

Our initial inquiry must be whether the order is appealable. Recognizing that the order is interlocutory, we would nevertheless have appellate jurisdiction under 28 U.S.C. § 1292(a)(1) (1976) [11] if that order is injunctive in character. Therefore, resolution of this issue depends upon the nature of the order. The objectors argue that the order enjoins them from prosecuting their state court actions for punitive damages. In response the class argues that the order is not an injunction because it does not use injunction terminology and, more importantly, it does not enjoin the objectors from settling their claims. The class characterizes the order as follows:

> [t]he motion concerns only whether the defendants can use individual punitive damage settlements as evidence to defeat or diminish the recovery of punitive damages in the classwide trial on that issue. *The representative plaintiff and the class have never sought to enjoin any member of the class from entering into an individual settlement of any claim.*

Brief on Behalf of the Representative Plaintiff and the Class at 4 (emphasis added). We do not agree with that characterization and conclude that we do have jurisdiction under 28 U.S.C. § 1292(a).

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[11] 28 U.S.C. § 1292(a)(1) provides in pertinent part:

> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States . . . , granting, continuing, modifying, refusing or dissolving injunctions . . . .

The determination of whether an order is an injunction depends upon the substantial effect of the order rather than its terminology. *See Ettleson v. Metropolitan Life Insurance Co.*, 317 U.S. 188 (1942); *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775 (3d Cir. 1975).

In the present case, contrary to the class's assertion, the district court expressly prohibited class members from settling their punitive damage claims:

> Legitimate claimants may negotiate and execute settlements with those defendants who have vociferously urged this court to allow the settlement process to continue. *Those claimants who want to exact payment for allegedly punishable acts must forego the settlement process and await the trial of the punitive damage issues.*

In re Federal Skywalk Cases, slip op. at 17 (emphasis added). In addition, the substantial effect of the order also enjoined the state plaintiffs from pursuing their pending state court actions on the issues of liability for compensatory and punitive damages and the amount of punitive damages.

At oral argument counsel for the class argued that 28 U.S.C. § 1292(a)(1) should not be construed to apply to class certification because the inevitable effect of a mandatory class is an injunction against state court actions on class issues. We conclude that the argument is not persuasive on the facts before us.

It is true that parties to a mandatory class are not free to *initiate* actions in other courts to litigate class certified issues. *See Reynolds v. National Football League*, 584 F.2d 280, 283 (8th Cir. 1978). However, in the present case the objectors had commenced their state court actions before the motion for class certification had been filed in district court. The state court cases had been filed, con-

solidated, and discovery had begun.[12] It is this injunction against pending state court actions that gives us jurisdiction under 28 U.S.C. § 1292(a). *See In re W. F. Hurley, Inc.*, 553 F.2d 1096, 1101 (8th Cir. 1977); *In re Glenn Turner Enterprises Litigation*, 521 F.2d at 775.

Because we have jurisdiction over the appeal and because the injunction is interdependent with the remainder of the appealed order, we may review the entire order insofar as it has been appealed. *See Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940) (jurisdiction reviewable); *Adashunas v. Negley*, 626 F.2d 600, 602 (7th Cir. 1980) (class issues reviewable); *Emerson Electric Co. v. Black and Decker Manufacturing Co.*, 606 F.2d 234 (8th Cir. 1979) (venue reviewable). Therefore, we need not decide whether the order would have been reviewable as a petition for mandamus.

Our conclusion that the order enjoins pending state proceedings necessitates an inquiry as to the propriety of that order under the Anti-Injunction Act, 28 U.S.C. § 2283. The Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment."

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[12] Judge O'Leary had also aided in the settlement process by convincing the insurers for Hallmark Cards, Inc., Crown Center Redevelopment Corp. and the Hyatt Corp. to commit a minimum of $151 million of the total $333 million liability insurance coverage to the settlement of the claims. *Hyatt Corp. v. Occidental Fire & Cas. Co.*, No. CV81-22009 (Mo. Cir. Co. Dec. 30, 1981), transcript 54-55, 75-77.

Prior to the class certification 123 cases had been settled. The settlement process slowed down considerably after the class certification because the plaintiffs were not able to release their punitive damage claims. *In re Federal Skywalk Cases*, slip op. at 17. The defendants were unwilling to pursue only compensatory damage settlements.

In *Atlantic Coast Line R.R. v. Locomotive Engineers*, 398 U.S. 281, 286-87 (1970), the Supreme Court recognized that the Act imposes a flat and positive prohibition:

> On its face the present Act is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. The respondents here have intimated that the Act only establishes a "principle of comity," not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention. In 1955 when this Court interpreted this statute, it stated: "This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 515-516, [75 S.Ct. 452, 455, 99 L.Ed 600] (1955).

Recently a plurality of the Court in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977), emphasized the continuing force of *Atlantic Coast Line*:

> The origins and development of the present Act, and of the statutes which preceded it, have been amply described in our prior opinions and need not be restated here. The most recent of these opinions are *Mitchum v. Foster*, 407 U.S. 225, [92 S.Ct. 2115, 32 L.Ed.2d 705] (1972), and *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, [90 S.Ct. 1739, 26 L.Ed.2d 234] (1970). Suffice it to say that the Act is an absolute prohibition against any injunction of any state court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act. The Act's purpose is to forestall the inevitable friction between the state and

federal courts that ensues from the injunction of state judicial proceedings by a federal court. *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9, [60 S.Ct. 215, 218, 84 L.Ed. 447] (1940). Respondents' principal contention is that, as the Court of Appeals held, § 16 of the Clayton Act, which authorizes a private action to redress violations of the antitrust laws, comes within the "expressly authorized" exception to § 2283.

We test this proposition mindful of our admonition that:

> "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast Line R. Co., supra*, [398 U.S.] at 297, [90 S.Ct. 1739].

This cautious approach is mandated by the "explicit wording of § 2283" and the "fundamental principle of a dual system of courts." *Ibid.* We have no occasion to construe the section more broadly:

> "[It is] clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation." *Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511, 514, [75 S.Ct. 452, 454, 99 L.Ed. 600] (1955).

433 U.S. at 630-31 . . . .

See also County of Imperial v. Munoz, 449 U.S. 54 (1980) (reemphasizing absolute nature of the Act).

Therefore, if the injunction is to be upheld, it must be on the basis that the district court's authority derives from one of the three exceptions. On appeal the class relies on the "necessary in aid of its jurisdiction" exception. In support it first draws an analogy between the

order and a Rule 22 interpleader under which a federal court can enjoin claimants from prosecuting claims in state court. The class reasons that here, as in the interpleader situation, there is a limited fund and that the class action is necessary to protect all claimants. We disagree.

The analogy is based on the premise that the possibility of defendants being required to pay only one punitive damage award is comparable to the limited fund concept underlying federal interpleader. That premise is erroneous. "Federal interpleader jurisdiction depends on identifiable property or a limited fund or pecuniary obligation, and it is not proper to predicate jurisdiction on the mere potential to recover damages for pecuniary injury." *Murphy v. Travelers Insurance Co.*, 534 F.2d 1155, 1159 (5th Cir. 1976), *citing Wallach v. Cannon*, 357 F.2d 557 (8th Cir. 1966).

In the present case the class has an uncertain claim for punitive damages against defendants who have not conceded liability. The claim does not qualify as a limited fund which is a jurisdictional prerequisite for federal interpleader. Without the limited fund there is no analogy to an interpleader and no reason to treat the class action as an interpleader for purposes of the Anti-Injunction Act.

The class proposes a second analogy between the order and several earlier decisions which allowed an injunction when an insurance company brought a federal suit for a declaratory judgment that a particular policy was invalid and the beneficiary subsequently sues in state court to recover under the policy. We conclude that the analogy is not persuasive.

Initially we note that the most recent case cited by class was decided in 1940, long before the enactment of the

current Anti-Injunction Act.[13] We also note that even the commentator cited by the class acknowledges:

> . . . it seems probable that a federal court would not be warranted in enjoining the prosecution of a pending state action [on the policy], where it is brought during the contestable period and there is an opportunity to set up the defense of fraud in the state court . . . .

1A Moore's Federal Practice ¶ 910.225 at 2621.

In addition, the cited cases are distinguishable on the basis that they involved situations in which identical parties were litigating mutually exclusive theories concerning their rights in the same policy in different forums. Such is not the case here. Furthermore, as conceded by the class, the cases involved injunctions against subsequent state actions. In contrast, the injunction in the present case was against pending state actions.

Next the class argues that allowing individual actions in state court will nullify the purpose of the class. The Supreme Court has narrowly interpreted the "necessary in aid of jurisdiction" exception, and a pending state suit must truly interfere with the federal court's jurisdiction. As the objectors correctly point out, a plurality of the Supreme Court reaffirmed in *Vendo Co.* its earlier

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[13] The class representative cites the following cases in support of her argument: *Keystone Dairy Co. v. New York Life Ins. Co.*, 19 F.2d 68 (3d Cir. 1927); *Mutual Ben. Health & Accident Ass'n v. Teal*, 34 F. Supp. 714 (E.D.S.C. 1940); *Jamerson v. Alliance Ins. Co.*, 87 F.2d 253 (7th Cir.), *cert. denied*, 300 U.S. 683 (1937) (by implication); *Brown v. Pacific Mut. Life Ins. Co.*, 62 F.2d 711 (4th Cir. 1933) (by implication). We need not decide how those cases would be decided today. *But see* 17 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure §§ 4222-4223 (1978), explaining that the Anti-Injunction Act was not applied as an absolute prohibition against enjoining state court proceedings until the Supreme Court's decision in *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941).

holdings that a simultaneous *in personam* state action does not interfere with the jurisdiction of a federal court in a suit involving the same subject matter.

> In *Toucey v. New York Life Ins. Co.*, 314 U.S. [118], at 134-135, [62 S.Ct. 139, 144, 86 L.Ed. 100 (1945)], we acknowledged the existence of a historical exception to the Anti-Injunction Act in cases where the federal court has obtained jurisdiction over *res*, prior to the state-court action. Although the "necessary in aid of" exception to § 2283 may be fairly read as incorporating this historical *in rem* exception, see C. Wright, Federal Courts, § 47, p. 204 (3rd ed. 1976), the federal and state actions here are simply *in personam*. The traditional notion is that *in personam* actions in federal and state court may proceed concurrently, without interference from either court, and there is no evidence that the exception to § 2283 was intended to alter this balance. We have never viewed parallel *in personam* actions as interfering with the jurisdiction of either court; as we stated in *Kline v. Burke Construction Co.*, 260 U.S. 226, [43 S.Ct. 79, 67 L.Ed. 226] (1922):
>
> > "[A]n action brought to enforce [a personal liability] *does not tend to impair or defeat the jurisdiction* of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* . . . ." *Id.*, at 230, [43 S.Ct. 79 at 81] (emphasis added).
>
> 433 U.S. at 641-42 . . . .

In the present case the federal and state actions are *in personam* claims for compensatory and punitive dam-

ages. Therefore, based on the foregoing principles, we are compelled to hold that despite Judge Wright's legitimate concern for the efficient management of mass tort litigation, the class certification order must be vacated. Mr. Justice Black's concluding words in *Atlantic Coast Line* are particularly apt here:

> This case is by no means an easy one. The arguments in support of the union's contentions are not insubstantial. But whatever doubts we may have are strongly affected by the general prohibition of § 2283. Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.

398 U.S. at 296-97.

The foregoing ruling does not dispose of the entire appeal because the objectors also seek the disqualification of Judge Wright under 28 U.S.C. § 455(a), which provides that a judge ". . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The objectors argue that Judge Wright's ex parte communications with Collins raise reasonable questions as to whether Judge Wright is biased in favor of the obliging class members. We disagree.

28 U.S.C. § 455(a) requires a judge to disqualify himself if a reasonable person would have factual grounds to doubt the impartiality of the court. *Blizard v. Frechette*, 601 F.2d 1217, 1220 (1st Cir. 1979). The determination for the district judge to make is whether "his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Once that determination has been made, our role on review is limited to deciding whether the district court's

evaluation of the claim of partiality or prejudice amounted to an abuse of discretion. *Blizard v. Frechette*, 601 F.2d at 1221:

Initially we note that we do not condone Judge Wright's communications with Collins. Once it became apparent that the named plaintiff could not serve as class representative, we think the better practice would have been for the district judge to have called counsel for all potential class representatives and held a hearing to determine whether any of them would serve as class representative in the event the district judge decided to certify a class. However, after a careful review of the entire record, we conclude that Judge Wright did not abuse his discretion in refusing to disqualify himself.

A claim of bias must be evaluated in light of the full record, not simply in light of an isolated incident. *See Walker v. Bishop*, 408 F.2d 1378, 1382 (8th Cir. 1969). In the present case Judge Wright developed an extensive record before he made his decision to certify the class. By order dated November 17, 1981, Judge Wright directed the parties and invited all interested parties to submit briefs on any issues relevant to the certification of a class. On December 10, 1981, Judge Wright held a hearing on the motion at which time the parties had the opportunity to present their objections to the court. During the course of the hearing, Judge Wright decided that two additional issues needed briefing, namely (1) whether multiple punitive damage verdicts could be obtained by successive plaintiffs based on the same conduct and (2) whether Missouri law allows recovery of punitive damages in wrongful death actions. These issues were briefed and submitted to Judge Wright before he made his decision to certify the class.

The order itself is carefully reasoned and stresses Judge Wright's concern that "[i]f a defendant can only be punished once, then the first claimant to get an award [of punitive damages] is the first and only winner. The

Court is not inclined to permit the sacrifice of one aggrieved party's claim for the sole benefit of another aggrieved party." *In re Federal Skywalk Cases*, slip op. at 11.

We conclude that Judge Wright certified the class based solely on his judgment that such action would best serve the interests of all parties involved. In addition, we note the complexity of the issues before Judge Wright and commend his creative efforts in attempting to achieve a fair, efficient and economical trial for the victims of the Hyatt Regency disaster.[14] However, as explained above, the order cannot stand on the facts before us.

The order of the district court is vacated.

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[14] We note that several commentators, including Professors Moore, Wright and Miller, also maintain that class actions are particularly appropriate for disposing of mass accident litigation. *See* Comment, *Mass Accident Class Actions*, 60 Cal. L. Rev. 1615, 1616 n.7 (1972).

HEANEY, Circuit Judge dissenting.

The majority decision is very narrow, holding that the mandatory class action certified by the court below violates the Anti-Injunction Act. It is clear, as the majority recognizes, that the Act would not be contravened by an opt-out class action. On remand, the district court should consider whether such an opt-out class is appropriate.

I dissent, nonetheless, because I believe that the district court's mandatory class action, if slightly modified, would be proper. We should modify the district court's order by permitting punitive damage claims to be settled and by providing that the defendants will receive credit for any such settlements when and if there is a class-wide award of punitive damages. Such a modified class action would satisfy the requirements of Fed. R. Civ. P. 23 and would not violate the Anti-Injunction Act. Moreover, it would provide the fairest way of all plaintiffs to seek recovery in the manner in which they choose—either through settlement or prompt judicial resolution of their claims.

I.

INTRODUCTION.

The crucial issue on this appeal is the effect of the district court's class certification order on the settlement process. As long as a class suit does not prevent the plaintiffs who wish to settle from doing so, no one seriously contends that it will deny them the opportunity to secure fair and expeditious compensation for their losses —either by settling or promptly proceeding to trial. The objectors, however, urge that settlements are blocked by the district court's order because individual plaintiffs cannot settle punitive damage claims,[1] and thus can-

[1] The district court's class certification order expressly prohibits class members from settling their punitive damages claims:

not execute general releases. Without such general releases, the objectors claim that the defendants are not protected against any further assertion of claims by settling plaintiffs.

I share the majority's belief that those plaintiffs who wish to settle all their claims should be permitted to do so. The class action need not be decertified to achieve this result. This goal can be accomplished by modifying the district court's order: (1) to expressly permit the settlement of punitive damage claims, and (2) to provide that the defendants will receive credit for the punitive claims they settle when and if a class-wide punitive damage award is ordered. Both the class action plaintiffs and the defendants have suggested methods for providing credit to the defendants for any claims they settle.[2] It may be that a hearing on the issue would develop additional alternatives. In my view, the district court should be directed to proceed without delay to hold the necessary hearings and adopt a procedure. As soon as this result is accomplished, the settlement process could proceed unimpeded by the class lawsuit.

Legitimate claimants may negotiate and execute settlements with those defendants who have vociferously urged this court to allow the settlement process to continue. *Those claimants who want to exact payment for allegedly punishable acts must forego the settlement process and await the trial of the punitive damage issues.* [Emphasis added.]

[2] Class counsel suggest that a class-wide punitive damage trial, including settling and non-settling plaintiffs, be held to determine the total puntive damages, if any, to be awarded. The sum awarded would then be allocated among the plaintiffs in accordance with an equitable formula approved by the court, with the portion of the award earmarked for settling plaintiffs credited to the defendants.

The defendants suggest that the plaintiffs who have settled not be permitted to participate in the punitive damage trial and that the defendants be permitted to introduce evidence of the settlements they have reached. The jury would then determine the amount of punitive damages, if any, to be divided among the non-settling plaintiffs at trial according to the approved formula.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY CERTIFYING A MANDATORY CLASS ACTION

The district court's order cannot be vacated unless its certification of the class action constitutes an abuse of discretion. *E.g., Rule v. International Association of Bridge, Structural & Ornamental Ironworkers*, 568 F.2d 558, 563 (8th Cir. 1977). I believe that the district court did not abuse its discretion; its certification order is supported by several important considerations.

A. *Justifications for Class Certification.*

The plaintiffs who sustained serious injuries or seek to recover for the death of family members should not be denied the opportunity to be promptly compensated. Likewise, plaintiffs seeking less substantial actual damages and punitive damages should not be effectively deprived of their claims. A class suit provides a device by which these smaller claims can be aggregated and litigation costs prorated among numerous claimants, thereby making worthwhile claims that might otherwise not be pursued.[8] *E.g., Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 338 (1980). *See* Comment, *The Use of Class Actions for Mass Accident Litigation*, 23 Loyola L. Rev. 383, 384-385 (1977). Note, *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318-1322, 1354-1355 (1976). Thus, a class action provides the best method for *all* plaintiffs to vindicate their legitimate claims.

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[8] Here, individual actions would impose an enormous financial burden on individual victims because of the hundreds of thousands of documents involved, the importance of expert testimony regarding engineering and architectural matters, and the numerous defendants each disclaiming responsibility and pointing at others.

A class suit on the liability and punitive damage issues also provides an effective means to confine and manage the substantial litigation arising from this mass disaster. *See, e.g.*, 7A Wright & Miller, Fed. Prac. & Proc.: Civil, § 1783 at 116-117 (1972); Note, *Developments in the Law—Class Actions, supra*, 89 Harv. L. Rev. at 1318-1322, 1354-1355; Note, *Mass Accident Class Actions*, 60 Cal. L. Rev. 1615 *passim* (1972). It conserves litigant and judicial resources by permitting the liability and punitive damage issues to be tried once, and only once; thereby avoiding a multiplicity of lawsuits on the same issues involving the same facts and the same defendants.[4] Moreover, it promotes judicial economy, by focusing this litigation in the court that will have to resolve the major disputed issues in this case. The defendants have already begun to file in federal district court their lawsuits to determine the respective liability and contribution issues among the various tort feasors.

Moreover, a single class-wide adjudication of punitive damages ensures that every victim will receive his or her just share of any punitive damage award. Absent a class action, the distribution of punitive damages will be determined in a succession of individual lawsuits. In that event, the risk exists that individual juries will reach inconsistent results on the liability and damage issues. Moreover, even if the results are consistent, the risk

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[4] If the issue of liability for compensatory damages was not tried on a class-wide basis, every individual suit would require a determination of relative fault among all defendants held liable. Individual plaintiffs could not avoid this problem by relying on earlier verdicts because Missouri law while rejecting the old doctrine of mutuality of estoppel, *see Oates v. Safeco Ins. Co.*, 583 S.W.2d 713, 719 (Mo. 1979) (en banc), does not generally allow offensive use of collateral estoppel in multiple claimant tort cases. *See Tretter v. Johns-Manville Corp.*, 88 F.R.D. 329, 333 (E.D. Mo. 1980). Due process would forbid the defendants from estopping a plaintiff by relying on an earlier verdict in a suit to which the plaintiff was not a party. *See, e.g., Parkland Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979).

arises that late-suing plaintiffs will have their punitive damage recoveries reduced or even eliminated by prior awards because there is certainly some limit on the amount of exemplary damages the defendants will be required to pay.[5] A class action suit provides the most effective—and perhaps only—procedure to ensure that any recovery will be distributed equitably among all plaintiffs.[6] *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-842 (2d Cir. 1967) (dicta); *In Re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 526 F.Supp. 887, 897-900 (N.D. Cal. 1981) (hereafter cited as *In re Dalkon Litigation*). *See* Putz & Astiz, *Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?*, 16 U. San Fran. L. Rev. 1, 18-40 (1981); Note, *Mass Liability and Punitive Damages Overkill*, 30 Hastings L. J. 1797, 1800-1812 (1979); Note, *Mass Accident Class Actions*, *supra*, 60 Cal. L. Rev. at 1624-1639.

B. *Objections to Class Certification.*

Despite these justifications for a class action, the objectors argue that the district court's order constitutes an abuse of discretion.[7] Most importantly, they contend that Rule 23(b)(1)(B) simply does not authorize a class

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[5] Punitive damages may be limited here either by Missouri law, constitutional due process, or simply the extent of defendant's assets. *See* slip op. at 24-27, *infra*, for discussion.

[6] As the district court said in *In re Dalkon Litigation*, 526 F. Supp. 887, 900 (N.D. Cal. 1981):

> Without a Rule 23(b)(1)(B) class action, * * * [t]here is no basis for priority to punitive damages among the claimants, or for awarding such damages to one or more and not to others * * *. [*T*]*he class action is the best available device to protect the interests of all parties.* [Emphasis added.]

[7] A class action certified under Rule 23(b)(1) must satisfy both the requirements of Rule 23(a)(1)-(4) and the relevant subsection to (b)(1). *See* slip op. at p. 4 n.7 for the relevant provisions of Rule 23.

action in this case. A class action may be certified under Rule 23(b)(1)(B) when a number of individuals claim rights to a share of a fund that is too small to satisfy in full every individual's claim. *See, e.g., Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 & n.9 (9th Cir. 1976); *Coborn v. 4-R Corp.*, 77 F.R.D. 43, 45-46 (E.D. Ky. 1977). *See also* Note, *Developments in the Law—Class Actions*, *supra*, 89 Harv. L. Rev. at 1367. The objectors claim that the facts here do not support the district court's finding that there is a limited fund available to pay punitive damages awards. I disagree.[8]

Missouri law may preclude multiple punitive damage awards for a single wrongful act or omission. At oral

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[8] The objectors also claim that the district court's certification of a Rule 23(b)(1)(A) class on the issues of liability for compensatory and punitive damages was an abuse of discretion. They contend that Rule 23(b)(1)(A) is designed to eliminate the dilemma that would confront a party if judgments imposing conflicting and mutually incompatible standards of conduct are entered against it. They argue it is not intended, as the district court concluded, to apply to a situation in which there is only a possibility that a defendant might have to pay damages to some plaintiffs and not others. I agree with the objector's construction of Rule 23(b)(1)(A). *See, e.g., McDonnell Douglas Corp. v. U.S. District Court*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *Esler v. Northrup Corp.*, 86 F.R.D. 20, 38 (W.D. Mo. 1979); 7A Wright & Miller, Fed. Prac. & Proc.: Civil, § 1773 at 9 (1972).

Although the district court's reliance on Rule 23(b)(1)(A) was misplaced, its class certification was nonetheless appropriate. The issue of liability for compensatory damages could have been properly certified under Rule 23(b)(1)(B) along with the issues of liability for and amount of punitive damages. Under Missouri law, a defendant cannot be liable for punitive damages if he or she is not also liable for compensatory damages. *Probst v. Probst*, 595 S.W.2d 289, 292 (Mo. App. 1979). Thus, the prospect of a limited fund is dependent on liability for compensatory as well as punitive, damages. In addition, quite apart from any construction of Rule 23(b)(1)(A), the district court's concern for avoiding inconsistent results through individual determinations of the liability issues is a proper consideration in certifying any of the types of class action authorized by Rule 23.

argument, the objectors and the class representatives both conceded that the state law is uncertain and that there is a legitimate and reasonable argument that a defendant can be punished only once for conduct transcending ordinary negligence. The Missouri Court of Appeals recently dismissed as moot a case in which they might have resolved this question. *Monsanto Co. v. Parker*, No. 43829 (Mo. Ct. App. April 6, 1982). Thus, an award of punitive damages to the first litigant may preclude all subsequent awards to later plaintiffs. The harshness and unfairness of this potential result justifies the district court's class certification.

Even if multiple punitive damage awards are permissible, the class certification was appropriate because the defendants held liable may not have the capacity to satisfy the judgments against them.[9] The claims of those victims who have filed individual lawsuits exceed $1 billion in compensatory damages and $500 million in punitive damages. The total insurance of all the defendants is only $333 million. Moreover, the record does not reveal how that insurance coverage is divided among the defendants and how much, if any, of it is available to pay punitive damage awards.[10] Furthermore, we cannot determine on the record before us the net worth of the various defendants. If the three largest defendants—Crown Center, Hallmark and Hyatt—are not found liable for punitive damages, the insurance coverage and assets of the remaining defendants would become significant in-

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[9] Rule 23(b)(1)(B) does not require proof that claims "will," as a certainty, exhaust the defendant's capacity to pay. Certification is appropriate if there is a significant likelihood that individuals "may" effect claims of parties not before the court. *See* Fed. R. Civ. P. 23(b)(1)(B) advisory committee note; *In re Dalkon Litigation*, *supra*, 526 F.Supp. at 897; *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45-46 (E.D. Ky. 1977).

[10] Punitive damages frequently cannot be insured against. *See* Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L. J. 639, 641 (1980).

deed because they may well not be sufficient to satisfy the exemplary damage judgments in view of the large amounts sought by the plaintiffs.

Apart from the defendants' capacity to pay punitive damages, there is surely some limit imposed by law on the amount for which they can be held liable for a single wrongful act or course of conduct. Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of "fundamental fairness" that is essential to constitutional due process. *See Roginsky v. Richardson-Merrell, Inc.*, *supra*, 378 F.2d at 838-841; *In re Dalkon Litigation*, *supra*, 526 F.Supp. at 900: *See also Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?*, *supra*, 16 U. San Fran. L. Rev. at 29-31; Note, *Mass Liability and Punitive Damages Overkill*, *supra*, 30 Hastings L. J. at 1797-1800. Moreover, the basic jurisprudential precepts that litigation must come to an end and that a party cannot be repeatedly sued on the same cause of action are violated by excessive multiple punishment. *See Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?*, *supra*, 16 U. San Fran. L. Rev. at 29-31; Note, *Mass Liability and Punitive Damages Overkill*, *supra*, 30 Hastings L. J. at 1797-1800.

Consequently, I believe that the district court did not err in finding a significant likelihood that the punitive damage awards *may* exhaust the culpable defendants' capacity to pay the judgments.

The objectors next contend that the named class representative, Shirly Stover, does not "fairly and adequately protect the interests of the class" as required by Rule 23(a)(4). They base their claim on the fact that she did not move for class certification. While a class representative's failure to move for certification has been found in some circumstances to be an indication that he

or she will not adequately represent the class, such a failure is not dispositive of the issue. Indeed, a court may select as a class representative a class member who did not file for certification, *see, e.g., United States Parole Commission v. Geraghty*, 445 U.S. 388, 407 (1980), or it may even elect to certify a class and select a class representative even if no party seeks a class action. *See, e.g., Ford v. U.S. Steel Corp.*, 638 F.2d 753, 754 (5th Cir. 1981); *In re Dalkon Litigation, supra*, 526 F.Supp. at 894.[11] In addition, there was, of course, no need for Stover to move for class certification in this case since Molly Riley had already done so.

The objectors also argue that the counsel appointed for the class are inadequate because they are tainted with conflicts of interest. I find no support in the record for this contention.[12]

The objectors next claim that class certification was improper because the various claims present individual issues and the individual claimants have a strong interest in controlling their litigation. In particular, they rely on the Advisory Committee Notes to the 1966 amendments to the Federal Rules of Civil Procedure which indicate that class actions under Rule 23(b)(3) generally are inappropriate in mass accident cases.

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[11] The fact that a court has authority to certify a class action *sua sponte* also refutes the objectors claim that the district court lacked jurisdiction to create a class action because the only party that did move for certification of a class, Molly Riley, was not diverse to all the defendants.

[12] The objectors complain that the district court appointed class counsel without providing a full opportunity for all plaintiffs to participate in the selection. This conduct did not constitute reversible error; although it would have been the better practice to include all plaintiffs in the selection process. *See* Manual for Complex Litigation, Part 1, §§ 1.90-1.93, 4.53. In the district court's defense, however, it must be emphasized that the objecting plaintiffs indicated as strongly as they could that they had no interest in participating in a class action. If an opt-out class is certified on remand, the district court may provide for additional class counsel.

The petitioners reliance on this authority is misplaced. First, under the express terms of Rule 23, individual control is an articulated concern for courts to consider with respect to certifying a class only under subsection (b)(3), not subsection (b)(1) on which the district court here relied. Thus, the district court was not necessarily required to consider the claimants' interest in individual control before certifying a class under Rule 23(b)(1).[18]

Second, to the extent that the interest in individual control is relevant to certifying a Rule 23(b)(1) class, that concern does not preclude a class suit in mass accident cases. If the drafters of the rule had intended to create such a per se rule, they would have simply said so. *See* Comment, *The Use of Class Actions for Mass Accident Litigation*, *supra*, 23 Loyola L. Rev. at 405. Instead, the drafters said:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Fed. R. Civ. P. 23(b)(3) advisory committee note.

It is apparent that the concerns that prompted the drafters to conclude that class suits are not generally appropriate in mass accident cases are not applicable here. In this case, the facts relevant to liability will

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[18] The petitioners' reliance on *Causey v. Pan American World Airways, Inc.*, 66 F.R.D. 392, 399 (E.D. Va. 1975), and *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76, 79 (E.D. Pa. 1979), for their claim that the interest in individual control of claims supports a denial of a Rule 23(b)(1) class action is misplaced. Both the *Causey* and *Hobbs* courts relied on that interest as a ground not to certify a Rule 23(b)(3)—not a 23(b)(1)—class action.

not differ meaningfully from one claimant to another, and there is little or no likelihood of individual defenses being presented. The compensatory damage issues, of course, will involve differing factual questions, but these claims present no bar to class certification because the district court limited the class action to the liability and punitive damage issues as permitted by Rule 23(c)(4). Consequently, the concerns of individualization of issues and the claimants' interest in controlling their own case present no real obstacle to class suits in mass accident cases such as the instant one. *E.g.*, 3B J. Moore, Fed. Prac., ¶ 23.45[3] at 811 & n.35 (2d ed. 948); 7A Wright & Miller, *supra*, § 1783 at 117; Comment, *The Use of Class Actions for Mass Accident Litigation*, *supra*, 23 Loyola L. Rev. at 390; Note, *Mass Accident Class Actions*, *supra*, 60 Cal. L. Rev. at 1621.

Finally, the objectors contend that the district court's class certification deprives them of their constitutional rights. First, they argue that a class-wide award of damages to be divided among class members is a "fluid recovery" [14] that denies them their constitutional rights to due process and trial by jury.

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[14] A "fluid recovery" has three characteristics: (1) the amount of damages incurred by the class as a whole is adjudicated in a single trial, creating a damage fund; (2) class-member claimants who can prove valid claims may, after the class trial, obtain their proper share of the fund; and (3) the unclaimed portion of the fund is then applied to the class's benefit. *See* Comment, *Due Process and Fluid Class Recovery*, 53 Ore. L. Rev. 225, 227 (1974); Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 47 N.Y. L. Rev. 477, 482 (1972).

It is the third characteristic that creates the fluid recovery because the unclaimed funds generally will be turned over to the government or distributed through the market—typically in the form of a reduced charge for an item that the defendant previously overpriced. Note, *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1525 (1976). *See Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1010-1011 (2d Cir. 1973); *Bebchick v. Public Utilities Commission*, 318 F.2d 187, 203-204 (D.C. Cir. 1963). Here, the entire punitive damage award would be distributed to individual

The Constitution does not create an absolute bar to a class-wide assessment of punitive damages. The objectors' Seventh Amendment right will be satisfied by the opportunity to adjudicate the class-wide damage assessment before a jury.[18] *See Dickinson v. Burnham*, 197 F.2d 973, 908-981 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952) (1938 version of Rule 23). *See also, e.g.*, Note, *Developments in the Law—Class Actions*, *supra*, 89 Harv. L. Rev. at 1523-1525; Wright & Miller, *supra*, § 1784 at 122; Jacoby & Cherasky, *The Effects of Eisen IV and Proposed Amendments to Rule 23*, 12 San Diego L. Rev. 1, 24 (1974); Comment, *Due Process and Fluid Class Recovery*, 53 Ore. L. Rev. 225, 237 (1974); Note, *Eisen v. Carlisle & Jacquelin—Fluid Recovery, Minihearings, and Notice in Class Actions*, 54 B.U. L. Rev. 111, 123-124 (1974). In the absence of defenses that could be asserted against individual class members, or other such individualized inquiries, due process does not require multiple hearings as long as there is one full and fair determination of the merits. *See, e.g.*, Note, *Develop-*

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class members; consequently, the objectors are incorrect in claiming that the district court's order provided for fluid recovery. However, class-wide assessments of damages, even without fluid recovery, have also been challenged as violative of the constitutional guarantees of due process and trial by jury. *See* Note, *Developments in the Law—Class Actions*, *supra*, 89 Harv. L. Rev. at 1525.

[18] The objectors also claim that a class-wide assessment of punitive damages is impermissible under Missouri law because the damages "must be assessed by a jury in the light of the particular circumstances of the particular case." *Hupp v. North Hills Lincoln-Mercury, Inc.*, 610 S.W.2d 349, 357 (Mo. App. 1980). I disagree. This issue is one of first impression in Missouri. The cases relied on by the objectors are individual suits, not class actions, which merely state that the questions of whether to award punitive damages and, if so, in what amount are for the jury. *E.g., id.; Potter v. Milbank Manufacturing Co.*, 489 S.W.2d 197, 206 (Mo. 1972); *Wiener v. S. S. Kresge Co.*, 465 S.W.2d 666, 669 (Mo. App. 1971). Just as the Seventh Amendment right to a jury trial is satisfied by adjudicating the class-wide damage assessment before a single jury, the state law requirement is also satified.

ments in the Law—Class Actions, *supra*, 90 Harv. L. Rev. at 1523-1525; Comment, *Due Process and Fluid Class Recovery*, *supra*, 53 Ore. L. Rev. at 237; Note, *Eisen v. Carlisle & Jacquelin—Fluid Recovery, Mini-hearings, and Notice in Class Actions*, *supra*, 54 B.U. L. Rev. at 123-124.

In some circumstances courts have not permitted the class-wide calculation of damages. *See, e.g., Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (1973), *vacated and remanded on other grounds*, 417 U.S. 156 (1974); *In re Hotel Telephone Charges*, 500 F.2d 86, 92 (9th Cir. 1974). In other cases, however, the mechanism has been utilized. *See, e.g., Bebchick v. Public Utilities Commission*, 318 F.2d 187, 203-204 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963); *West Virginia v. Chas. Pfizer & Co.*, 314 F.Supp. 710, 744 (S.D. N.Y.), *aff'd*, 440 F.2d 1079, 1089-1091 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). The propriety of class-wide damage assessment, with or without a fluid recovery mechanism, should depend on whether it is consistent with the policies of the underlying cause of action. Note, *Developments in the Law—Class Actions*, *supra*, 89 Harv. L. Rev. at 1526-1536.

The justifications for imposing punitive damages include expressing society's disapproval of outrageous conduct, deterring such conduct in the future, and providing incentives for private civil enforcement. Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L. J. 639, 647-650 (1980). Each of these purposes is advanced by the district court's class certification here. Thus, a class-wide calculation of punitive damages would be proper.

The objectors' second constitutional claim is that the district court denied them due process by not permitting them to be heard after its class certification order. Specifically, they object to the order providing:

> No matters may be presented to this Court which concerns [sic] a member of the class unless it is [sic] presented by the counsel designated to handle the class action. The Clerk of the Court has been directed to reject any matters that are not being filed by counsel for the class or counsel for defendants.

In *Farber v. Riker-Maxson Corp.*, 442 F.2d 457 (2d Cir. 1971), the Second Circuit upheld an order of the district court virtually identical to the one here. The Court held that such an order did not deprive the parties prohibited from filing motions "an appropriate opportunity to participate in the litigation." *Id.* at 459. Indeed, the very nature of a class action requires that the class representative, and his or her attorney, represent the class and that members of the class cannot continue to file motions as they might in an individual action. Moreover, here, as in *Farber*, the district court's order did not bar counsel for class members from applying to it for permission to file a motion. *Id.* at 459. Accordingly, the district court's order did not deny the objectors due process.

C. *Summary.*

In sum, the district court's class action satisfies all the requirements of Rule 23, and the state and federal constitutions. Moreover, certification of a class action would promote judicial economy in a complex case where such concerns are especially significant. It would protect the interests of defendants by avoiding endless relitigation and inconsistent determinations of their relative liability. And, it would protect the plaintiffs by ensuring prompt determination of liability (thereby promoting settlements) and by guaranteeing that any punitive damage award would be fairly allocated to all plaintiffs. Therefore, I believe that the district court did not abuse its discretion in certifying the class action.

III.

THE DISTRICT COURT DID NOT VIOLATE THE ANTI-INJUNCTION ACT BY CERTIFYING A MANDATORY CLASS ACTION.

The majority recognizes that an opt-out class, which the district court remains free to certify, would not violate the Anti-Injunction Act. Because members of such a class would be free to withdraw and pursue their claims independently in state court, such a class action would not inherently restrict state court proceedings, nor would it afford any basis upon which the district court might enjoin state court proceedings. *See In Re Glenn Turner Enterprises Litigation*, 521 F.2d 775 (3d Cir. 1975).

The majority holds, however, that the mandatory class action violates the Anti-Injunction Act because some class members have already initiated state court proceedings and presumably will be enjoined from pursuing such independent actions. *See* slip op., *supra*, at 10, 15. This is a sweeping rule that prohibits certification of an otherwise proper mandatory class whenever a class member has commenced a state court action. In my view, such a rule is not supported by the cases relied upon by the majority and, moreover, is simply the wrong rule in light of the necessary dictates of mandatory class actions.

A mandatory class action, of course, has a restrictive effect on related proceedings in any other court—state or federal. This is because, by definition, members of such a class cannot pursue independent litigation of class claims. *See, e.g., Reynolds v. National Football League*, 584 F.2d 280, 283 (8th Cir. 1978). The majority states that a mandatory class only prohibits members from *initiating* independent litigation, citing *Reynolds v. National Football League, supra*, for this proposition. Slip op., *supra*, at 10. Neither *Reynolds* nor any other case cited to this Court supports such a narrow construction

of mandatory class actions. Indeed, the implication of the majority's view is that mandatory classes are not truly mandatory—any member who has previously commenced independent litigation is somehow not subject to the ordinary rules of such class actions. In my view, the plain meaning of a mandatory class does not change merely because some members of the class have previously initiated independent actions. If certification of a mandatory class is proper, as here it clearly is, then the ordinary rules of such actions simply preclude independent litigation of class claims in state or federal courts.

This point is important to whether the class action violates the Anti-Injunction Act. Under the Act, an injunction of state court proceedings is proper when it is "necessary in aid of" the federal court's jurisdiction. 28 U.S.C. § 2283. It seems self-evident that an injunction to protect the ordinary scope of a mandatory class action is "necessary in aid of" the federal jurisdiction over such a class.

I must emphasize that no plaintiff has, as yet, been enjoined from pursuing any state court action.[16] Our review is thus proper, if at all,[17] to the extent that certifi-

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[16] The only express injunction entered below is that part of the district court's order which appears to prevent class members from settling their punitive damage claims. Such a restriction is unwarranted and should be modified as noted, *supra*, at note 2. In any event, it is not a necessary part of certifying the mandatory class action and it is unfair to bootstrap from this part of the order to a finding that the class action as a whole violates the Anti-Injunction Act. *See* slip op., *supra*, at 9-10.

[17] The district court did not certify any issue for interlocutory appeal. Thus, it would be proper to review, under section 1292(a), only the express injunction before us, *see* note 16, *supra*, and to dismiss for lack of jurisdiction the issue of whether the class action will result in injunctions of state court proceedings. *See generally In Re Glenn Turner Enterprises Litigation*, 521 F.2d 775, 781 (3d Cir. 1975). I recognize, however, that mandatory class actions have an inherent restrictive effect on independent litigation of class

cation of a mandatory class will *necessarily* restrict class members from pursuing pending state court proceedings. The question then is whether such restrictions are "necessary in aid of" the class action jurisdiction.

Here, the necessary restrictive effects of the mandatory class action are twofold. The first restrictive effect is that class members would not be able to pursue a punitive damage claim in an independent action. Such a restriction is absolutely necessary to the district court's jurisdiction over this class issue due to the applicable state law on punitive damages. Although the parties do not agree on the certainty of the state law rule, they do agree that there is a legitimate and reasonable claim that under Missouri law, only the first plaintiff to achieve a judgment would obtain a punitive award—all other plaintiffs would be frozen out. *See* slip op., *supra*, at 22-25. When a mandatory class is necessary to protect all plaintiffs on this claim, it seems obvious that an injunction against independent litigation of the issue is "necessary in aid of" the jurisdiction of the class.

The second restrictive effect of the mandatory class is to, in effect, stay state court proceedings on the issue of liability for compensatory damages. I emphasize that the plaintiffs are free to settle such claims or to pursue in state court a determination of the amount of such damages, once the class action determines relative liability among the defendants.[18] The mandatory class is necessary to protect the numerous defendants from inconsistent results and extremely burdensome relitigations of their relative culpability and to ensure that serial deter-

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issues. If this fact is to serve as the basis for appellate review, however, such review should focus narrowly on the inherent restrictive effects of the class and should not broadly assume injunctions which have not been entered.

[18] Thus, the mandatory class does not preclude state court forums for those plaintiffs who believe, for whatever reason, that they might obtain more favorable compensatory damages in state court.

minations of liability will not deplete the assets of the defendants. *See* slip op., *supra*, at 24-27. Certification of the compensatory liability issue is also strictly necessary to protect the punitive damage claim noted above because, under ordinary joinder rules, an independent action on liability would necessarily reach both compensatory and punitive issues. Thus, if a mandatory class is to be certified at all, it must include the punitive claim and at least the liability aspect of compensatory damages. In my view, where a mandatory class is properly certified for these purposes, enjoining independent litigation of the class issue is plainly "necessary in aid of" the class jurisdiction.

The majority essentially ignores that it is a mandatory class action we are considering under the Anti-Injunction Act. They cite, for example, *In Re Glenn Turner Enterprises Litigation*, *supra*, which held that an injunction of state court proceedings was not "necessary in aid of" the federal class's jurisdiction. Slip op., *supra*, at 10. *Turner*, however, involved an opt-out class, not a mandatory one. The standard applied in *Turner* required a determination of whether the class action "can be given its intended scope only by stay of a state court proceeding." *In Re Glenn Turner Enterprises Litigation*, *supra*, 521 F.2d at 781. As the *Turner* Court properly reasoned, because the intended scope of an opt-out class permits independent actions, an injunction against such actions cannot be "necessary" to protect the scope of the class. *Id.* The *Turner* Court expressly reserved the issue of mandatory class actions, *id.*, for good reason. The intended scope of a mandatory class precludes independent litigation of class claims, which is why an injunction against such independent actions is "necessary" to give the class its intended scope.

The majority primarily relies on the general doctrine that individual *in personam* actions, conducted concurrently in state and federal courts, do not cause interfer-

ence with either court's jurisdiction. Slip op., *supra*, at 14-15. Thus, under the Anti-Injunction Act, an individual *in personam* claim in federal court is not a basis for enjoining other plaintiffs from pursuing similar claims in state court because such an injunction is not "necessary in aid of" the federal court's jurisdiction. *Id.* This rule developed around and applies to independent, *individual* claims, not mandatory class actions. The majority cites to no case in which this general rule has been used to preempt the ordinary application of mandatory class action rules.

Admittedly, the relationship between mandatory class actions and the Anti-Injunction Act appears to present an open question. The approach adopted by the majority, however, broadly forecloses mandatory class actions whenever a class member has commenced state court proceedings. I would agree that class actions should not become a vehicle for circumventing the ordinary relations between state and federal courts. The requirements for a mandatory class action, however, are quite rigorous and, by their nature, will prevent any such trend from developing. Moreover, there are unusually strong reasons for certifying the mandatory class here, a procedure which the district court found was essential to fair adjudication of all claims. Such circumstances will not often arise; yet in face of them, the majority has adopted a rule which broadly defeats the purpose of mandatory class action jurisdiction. I do not agree that such a rule is required by the Anti-Injunction Act, nor by any sensible view of the relations between state and federal courts.[19]

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[19] I do, however, agree with the majority that Judge Wright did not abuse his discretion by declining to disqualify himself from this case under 28 U.S.C. § 455(a).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term 1981

Nos. 82-1181/1207

IN RE: FEDERAL SKYWALK CASES
MELANIE HANSON JOHNSON, *et al*,
Petitioners.

IN RE: FEDERAL SKYWALK CASES
JACQUELINE N. RAU,
Appellant.

Petition for Mandamus/Application
For Immediate Temporary Stay

Appeal from the United States District Court
for the Western District of Missouri

The Court, having considered petitions for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petitions for rehearing and suggestions for rehearing en banc denied. Chief Judge Lay, Judge Heaney and Judge Bright would grant the rehearing en banc. Judge John R. Gibson did not participate in the considerations of the petitions.

The petition for rehearing considered by the panel is also denied.

July 9, 1982

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term 1981

No. 82-1181

IN RE: FEDERAL SKYWALK CASES
IN RE: MELANIE HANSON JOHNSON and GERARD STANLEY JOHNSON, *et al*,
Petitioners.

No. 82-1207

IN RE: FEDERAL SKYWALK CASES
JACQUELINE N. RAU,
Appellant.

Petition for Mandamus/Application
For Immediate Temporary Stay

Appeal from the United States District Court
for the Western District of Missouri

Motion for stay of issuance of mandate pending application for writ of certiorari in the Supreme Court of the United States has been considered by the Court and is denied.

Judge Heaney would grant the stay.

July 28, 1982

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

No. 81-0945-A-CV-W-5

IN RE FEDERAL SKYWALK CASES

ORDER AND MEMORANDUM

January 25, 1982

This action arises out of the collapse of two skywalks at the Hyatt Regency Hotel of Kansas City, Missouri on July 17, 1981. Plaintiff, Molly Riley, moves this Court to certify as a class action those claims of business invitees of the hotel who suffered physical, mental or property damage as the result of the collapse of the two skywalks. Several plaintiff-intervenors and defendants oppose class certification for varied reasons. Other defendants have not expressly opposed certification, but have asked the Court to delay its ruling on the motion to certify a class action until all of the parties have had an opportunity to voluntarily resolve their differences through settlement. All interested parties orally argued the motion on December 10, 1981.

On December 24, 1981, plaintiffs-intervenors moved to dismiss the motion for class certification on the ground that plaintiff Riley had failed to join all parties needed for a just adjudication. Ms. Riley, a Kansas resident, did not join two Kansas defendants because she lacked diversity of citizenship as to them. Since two defendants could not be bound by any determinations made at a single trial if Ms. Riley were named as the class representative, plaintiffs-intervenors' motion to dismiss her motion to certify is granted. This Court, however, may certify a class action on its own motion. Thus, for the

reasons which follow, the Court concludes that the most principled, efficient and expedient manner in which to conduct the litigation stemming from the tragic events of July 17 is in accordance with the provisions of Rule 23 of the Federal Rules of Civil Procedure. Accordingly, the Court determines that federal court plaintiffs Stover, Vrabel, Grigsby and Abernathey shall represent the class members, certifies a Rule 23(b)(1)(A) class action on the issues of liability for compensatory damages and liability for punitive damages, and certifies a Rule 23(b)(1)(B) class action on the issues of liability for punitive damages and the amount of punitive damages. Finally, the Court permits the individual unnamed plaintiffs to continue to settle their respective claims against any or all defendants.

I. *Summary of Skywalk Litigation*

On July 17, 1981, two skywalks in the central lobby of the Hyatt Regency Hotel in Kansas City, Missouri collapsed killing 113 persons and causing bodily injury to at least another 212 persons. Three days later the first lawsuits were filed in this Court and in the Circuit Court of Jackson County, Missouri. As of the date of this order, approximately 150 lawsuits have been filed in either of these two courts. In anticipation of the deluge of litigation that the skywalk disaster was certain to generate, the state and federal courts moved with alacrity to consolidate their respective cases for pretrial discovery. Liaison committees of plaintiffs' and defense counsel were selected to jointly initiate and conduct pretrial discovery.

Plaintiff Riley initially filed a civil action seeking class certification by the Circuit Court of Jackson County, Missouri on July 31, 1981. On September 1, 1981, Ms. Riley filed a similar action in this Court. In her action in this Court, Riley, a resident of Kansas, did not sue certain Kansas defendants. She dismissed her state court suit on September 24, 1981, and then moved this Court to certify a class action naming her as the class representative of all business invitees who were present at the

Hyatt Regency Hotel when two of its skywalks collapsed. On December 10, 1981, a hearing was conducted to determine whether her motion for class certification should be granted. From that hearing the Court finds the following facts to be true:

1. The collapse of two skywalks in the Hyatt Regency Hotel on July 17, 1981 killed 113 persons and caused bodily injury to at least another 212 persons.

2. A substantial number of persons who were present in the central lobby when the skywalks fell might have suffered emotional distress or might have failed to report their physical injuries.

3. Approximately 150 civil lawsuits have been filed in either this Court or the Circuit Court of Jackson County, Missouri.

4. Those persons who have filed lawsuits presently seek compensatory damage awards in excess of one billion dollars and punitive damage awards in excess of 500 million dollars.

5. The various defendants implicated by these suits are protected by liability insurance coverage in the aggregate amount of 333 million dollars.

6. By way of *in camera* revelation, the Court is cognizant of the approximate net worth of defendants Hyatt Corporation, Hallmark Cards Corporation, and Crown Center Redevelopment Corporation.

7. Numerous minor and some substantial claims have already been amicably settled.

8. The liability insurance carriers have been and are eager to continue to discuss the settlement of any legitimate claim.

After the December 10, 1981 hearing, plaintiffs-intervenors moved to dismiss Riley's motion for class certification on the ground that she failed to join certain parties who are needed for a just adjudication. The Court found merit in the plaintiffs-intervenors' motion to dismiss and,

as a consequence, commenced a search of court records in order to determine which federal court plaintiffs could serve as representatives of the class. The Court notices that plaintiffs Stover, Johnson, Vrabel, Grigsby and Abernathey have citizenships diverse from the defendants who have been sued. Only plaintiff Johnson, an intervenor in this action, has recorded apposition to the certification of the class action.

II. *Prerequisites to A Class Action*

The class action device, as contemplated by Rule 23 of the Federal Rules of Civil Procedure, is the proper tool for the accomplishment of principled, efficient and expeditious adjudication of skywalk claims which threaten to expose defendants to repeated trials of the compensatory and punitive damages issues, which threaten to leave many claimants without a practical chance for redress of punishable acts, and which threaten to congest the state and federal courts of this city for many years. This Court views Rule 23 as the key building block in the federal courts' continuing effort to make the civil procedural system more responsive to the needs of contemporary litigation. The magnitude of the litigation spawned by the collapse of two skywalks challenges this Court to administer these cases with flexibility and imagination. While other procedural vehicles might provide adequate guidelines for resolution of the complex issues posed by these cases, the circumstances of this litigation compel this Court to adopt the far superior procedures of Rule 23 for the resolution of the many claims arising out of an unfortunate tragedy.

A. *Diversity Jurisdiction*

The jurisdictional requirements of a conventional civil suit apply to class actions. *See Snyder v. Harris*, 394 U.S. 332, 340 (1969). In the context of a class action, only the citizenship of the named parties is relevant to the determination of jurisdiction. *Id.* Mr. Justice Black stated in *Snyder* that if

> one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State.

Id. at 340. Since at least two defendants which have been sued in the course of this litigation are of the same citizenship as plaintiff Riley, Riley cannot serve as the named representative of the class if the Kansas defendants are to be bound by the determinations made at the trial of the class action. As is subsequently discussed, the Court intends to try this lawsuit only once and to bind all parties to the determinations made at that single trial. Thus, Riley will not do as the named representative because her citizenship is not diverse from all the opponents of the class.

The citizenships of plaintiffs Stover, Vrabel, Grigsby and Abernathey, however, are diverse from the citizenships of all the defendants who have been sued. In addition, there appears to be no question that their claims, like the claims of all other members of the class, exceed the $10,000 amount in controversy requirement of 28 U.S.C. § 1332. The Court, therefore, concludes that, with these plaintiffs as the named representatives of the class, diversity jurisdiction exists and that all parties needed for a just adjudication of the issue presented by this unit can be joined.

B. *Rule 23(a)*

Rule 23(a) provides that these plaintiffs may sue as the representative parties of a class of all business invitees present at the collapse of the skywalks if

> (1) The class is so numerous that joinder of all members is impracticable, (2) there are questions of

law or fact common to the class, (3) the claims or defenses of representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Before the circumstances of this case can be analyzed in terms of those four prerequisites, the introductory language of Rule 23(a) implicitly requires two preliminary determinations. First, a class, which is capable of accurate description, must actually exist. *Vietnam Veterans Against The War v. Benecke*, 63 F.R.D. 675, 679 (W.D. Mo. 1974). The members of the proposed class are readily identifiable. They include all business invitees who were present in the main lobby of the hotel at the moment the two skywalks collapsed. Second, plaintiffs Stover, Vrabel, Grigsby and Abernathey must be members of the proposed class. There does not appear to be any serious question that their claims arise out of deaths and injuries suffered by persons present in the hotel lobby at the time of the skywalks' collapse. If any serious questions do arise, interested parties are obliged to file a motion to decertify.

In addition to satisfying the two preliminary requirements of Rule 23(a), each of the following Rule 23(a) prerequisites have been satisfactorily established:

1. Numerosity. Exactly 113 persons have died as a result of the collapse of the two Hyatt skywalks. At least another 212 persons suffered injuries which required hospitalization or treatment at an area hospital on the day of the collapse. In addition, a substantial number of people were present in the central lobby of the hotel when the skywalks fell. Though this latter group of people may not have suffered any physical injuries which required immediate attention, they might have suffered emotional distress as a consequence of the disaster. It has been estimated that a crowd of 1,500 to 2,000 persons were in the lobby of the hotel at the moment of the collapse. A

class which includes all business invitees present when the skywalks fell is sufficiently numerous to satisfy the requirement that joinder of all members of the class is "impracticable." *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 44 (E.D. Ky. 1977). Rule 23(a)(1) does not require a showing that joinder is "impossible." A showing of strong litigational inconvenience in the prosecution of claims separately by the proposed class members is sufficient. Thus, the first prerequisite of Rule 23(a) is satisfied.

2. Commonality. The claims of every member of the class arise from the collapse of the two skywalks. With the single exception of the amount of individual compensatory damages, the operative facts concerning each claim are identical. There are no issues of liability or defenses to liability for compensatory damages peculiar to individual members of the class. The issue of liability for punitive damages may require separate treatment of the wrongful death and survival claims. The Court, however, is prepared to provide the distinct treatment through the formation of a sub-class composed of wrongful death and survival actions in the event that it is subsequently determined that punitive damages are not available to wrongful death or survival claimants. Further, Rule 23(a)(2) requires only that there be one or more significant common questions of law or fact. It does not require that "all" questions of fact and law be common and must be distinguished from the requirement of Rule 23(b)(3) that common issues predominate. Thus, the commonality requirement of Rule 23(a)(2) is satisfied. *Like v. Carter*, 448 F.2d 798, 802 (8th Cir. 1971), *cert. denied*, 405 U.S. 1045 (1972).

3. Typicality. The claims of the four named plaintiffs reflect the claims of every other member of the class. Plaintiff Stover and her children seek redress for the allegedly wrongful death of her husband and for the alleged serious injuries she suffered as a result of the collapse. Plaintiffs Vrabel and Abernathey allegedly suf-

fered personal injuries, while the Grigsby plaintiffs have sued to recover for the alleged wrongful death of their mother. Though the amount of compensatory damages is unique to each member of the class, the legal or remedial theories advanced by the class representative are the same as those advanced by other unnamed members of the class. Thus, the typicality requirement of Rule 23(a)(3) is satisfied. *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 839-30 (8th Cir. 1977), *cert. denied*, 434 U.S. 856 (1977).

4. Adequacy. This Court bears an affirmative obligation to ascertain the adequacy of representation and to monitor it throughout the course of the litigation. The duty is grounded on a fairness rationale which recognizes that some class members did not choose this forum or the counsel ultimately selected to shoulder the burdens of this litigation. The adequacy inquiry focuses on the representative parties and the class counsel.

The class representatives are able to act as fiduciaries in protecting class interests and have resources available for the prosecution of the certified claims. They do not have any interest which conflicts with interests of other class members, are not motivated by reasons which are unrelated to the circumstances of the case itself, and hold a very substantial stake in the outcome of the controversy. Some parties have asserted that their interest in settling their cases conflicts with the prosecution of a class action. Their interest in settling their claims, however, is not restricted by this order. The only parties who cannot settle their claims prior to the conclusion of a jury trial of the certified issues are those named as the class representatives. If any of the plaintiffs named as class representatives in this order would want to negotiate the settlement of their case prior to trial, they should notify this Court within ten (10) days of the date of this order.

The Court selects the counsel for plaintiff Riley to serve as lead counsel for the prosecution of this class action. Counsel for plaintiffs Stover, Vrabel, Grigsby and Abernathey may assist plaintiff Riley's counsel. These counsel can adequately represent the members of the class. The lead class counsel have experience in complex litigation and are ably qualified to conduct the proposed litigation. In the estimation of this Court, lead counsel have exhibited sufficient motivation, competence and resources to successfully maintain a class action. The Court also notices that counsel for Stover, Vrabel, Grigsby and Abernathey are able attorneys who have extensive experience in the areas of personal injury law and will grant them ten (10) days from the date of this order to withdraw as assistant class counsel if they would prefer not to serve. In addition to these class counsel, the Court has received numerous offers of assistance from interested attorneys and will grant other interested attorneys an additional seven (7) days from the date of this order to submit their names for service as class counsel. In light of all of the above, the Court concludes that the four native plaintiffs are adequate class representatives and that the counsel presently selected by the Court can adequately represent the interests of the class.

III. *Maintainable Class Actions Under Rule 23(b)*

Not only must this action meet all the prerequisites of a class action as listed in subdivision (a) of Rule 23, but it must also satisfy at least one of the three sections of subdivision (b) of Rule 23. Riley initially moved this Court to certify a class action on the issues of liability for and amount of punitive damages under Rule 23(b)(1)(B) and the issue of liability for compensatory damages under either Rule 23(b)(3) or Rule 23(b)(1)(B). While no other plaintiff joined in Ms. Riley's motion to certify a class action, counsel for numerous other plaintiffs either have voiced their support for the utilization of the class action device or have offered their services

in the event that a class action is certified. The Court has also received correspondence from individual claimants who have questioned the true motivation of those counsel who opposed class certification and have asked the Court to guard the best interests of all the parties involved. Though some of the defendants have taken the position in this litigation that they cannot lawfully be subject to multiple punitive damage awards in successive suits, none has moved this Court to certify a class action in order to protect them from multiple punitive damage awards or incompatible standards of conduct. Some defendants, while neither opposing nor supporting certification, have asked the Court to defer its ruling on the motion to certify until all of the parties have had an opportunity to voluntarily resolve their legitimate claims through settlement.

Rule 23(c)(1) directs this Court to determine whether a class action to be maintained as soon as practicable after the commencement of the action. Since the ruling of this Court does not impinge on the ability of unnamed plaintiffs and defendants to settle their differences, there is no just reason for delay of this decision. Although this Court has denied plaintiff Riley's motion to certify a class because complete diversity was lacking, this Court, nonetheless, enjoys a wide range of discretion in determining whether a class action ought to be maintained, *Senter v. General Motors Corp.*, 532 F.2d 511, 520-21 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); *Castro v. Beecher*, 459 F.2d 725, 731-32 (1st Cir. 1972), and what issues ought to be certified, *Gardner v. Westinghouse Broadcasting Co.*, 559 F.2d 209, 212 (3d Cir. 1977). *See generally, American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). It is this Court's firm belief that the preservation of the collective best interests of all parties concerned with this litigation and the avoidance of wasteful repetitive litigation are best accomplished by trying the issues of liability for compensatory damages, liability for punitive damages and amount of

punitive damages only once. To that end, this Court, on its own motion, determines that a Rule 23(b)(1)(A) class action on the issues of liability for compensatory damages and liability for punitive damages, and a Rule 23(b)(1)(B) class action on the issues of liability for and amount of punitive damages must be certified.

A. *Requirements of Rule 23(b)(1)(A).*

Rule 23(b)(1)(A) directs the Court to consider whether multiple individual suits aimed at determining any or all defendants' liability for compensatory and punitive damages would have an adverse effect on those defendants. The subdivision provides that a class action may be maintained if the prosecution of separate actions by individual members of the class would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Thus, in order to consider Rule 23(b)(1)(A) as a proper vehicle for resolving the liability issues, there must be a risk that separate actions will, in fact, be tried if a class action is not certified.

Given the nature of the personal injury and punitive damage claims filed in this litigation, this Court would be embarking on utter naivete if it concluded that there was not a substantial likelihood of multiple suits being tried. *See Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558, 561-62 (S.D. Fla. 1974), *aff'd* 507 F.2d 1278 (5th Cir. 1975). Not all claimants will be mollified by the amounts offered in settlement, since they have expressed an avowed determination to try to punish those defendants, if any, which were responsible for the tragic events of July 17. While this Court wholeheartedly encourages the continued settlement of legitimate claims, and is mindful that the vast majority of claims may be settled, it cannot, in good conscience, allow a minority of claimants to take any or all defendants to trial time and time

again until a compensatory or punitive damage judgment is obtained. *Hernandez, supra* at 561.

Though no defendant has expressly moved this Court to certify a Rule 23(b)(1)(A) class action in order to protect it from successive punitive damage awards or from inconsistent adjudications on the liability issues, the Court believes that Rule 23(b)(1)(A) certification is necessary as a ready and fair means of achieving unitary adjudication. *See*, Advisory Committee Comments, 39 F.R.D. 95, 100 (1966). *See also Hernandez, supra* at 560. One or more of the defendants risk being faced with incompatible standards of conduct if varying or inconsistent adjudications with respect to individual members of the class were obtained on the issues of liability for compensatory or punitive damages. *Coburn v. A-R Corp.*, 77 F.R.D. 43, 46 (E.D. Ky. 1977); *Hernandez, supra* at 561. As in the case at bar, the defendants in the *Hernandez* case objected to the certification of a class action on the ground that certification would prevent the amicable settlement of legitimate claims. *Id.* at 559 n. 3. The *Hernandez* court did not allow the settlement process to continue because of the limited fund available to pay compensatory damages, but certified the class in order to avoid a multiplicity of suits and inconsistent or varying adjudications. *Id.* Unlike the circumstances facing the *Hernandez* court, in the case at bar, there is no evidence of a limited fund with respect to the payment of compensatory damages. Thus, the settlement of claims for compensatory damages may continue.

Since a Rule 23(b)(1)(A) class action on the issues of liability for compensatory and punitive damages offers economy of effort and uniformity of result without imposing undue debilitation of the procedural or substantive safeguards of members of the class or of persons defending against the class action, this Court concludes that a Rule 23(b)(1)(A) class action on the issues of liability for compensatory and punitive damages must be certified.

B. *Requirements of Rule 23(b)(1)(B).*

Rule 23(b)(1)(B) provides for class treatment in cases in which separate suits might have undesirable effects on the class members. The passage states that a class action might be maintained if individual actions would create a risk of individual adjudications that "would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests." While Rule 23(b)(1)(A) focuses on the possible prejudice to the party opposing the class, Rule 23(b)(1)(B) focuses on the ability of the individual members of the class to protect their interests if other class members brought separate actions. It is quite common for suits brought under Rule 23(b)(1) to meet the tests of clause (A) and clause (B) of that provision. *See generally* 7A Wright and Miller, Federal Practice and Procedure, § 1772 n. 72 (1972 & Supp. 1981). So long as a class action is maintainable under Rule 23(b)(1), nothing turns on which clause is controlling. *Id.* at § 1772.

Rule 23(b)(1)(B) most often applies to cases that involve multiple claims to a fund which may be insufficient to satisfy all the claims. *See, e.g., In Re "Dalkon Shield" Litigation*, Slip. op. C80-2213 SW, (N.D. Cal., Nov. 5, 1981); *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558 (S.D. Fla. 1974), *aff'd*, 507 F.2d 1278 (5th Cir. 1975). Where a limited fund exists, individual members of the class face a very real risk that the winner of the race to the courthouse might be awarded all of the monies available. Though the availability of sufficient funds to cover the claims for compensatory damages is not presently in question, there is a question as to whether sufficient funds are available to pay awards of punitive damages.

At the present time, the funds available to pay for punitive damages appear to be limited. For example, the continued payment of compensatory damages necessarily depletes the resources of the defendants who continue to settle claims against them. Second, there is the possibility that few, if any, defendants will be found liable for punitive damages. No defendant has unlimited assets and most do not have sufficient assets to warrant a sizable punitive damage award. Finally, there is some uncertainty under Missouri law as to whether a single defendant can be liable for more than one award of punitive damages. *See Monsanto Co. v. Parker*, No. 43829 (Mo. App., E.D., argued Dec. 9, 1981). If a defendant can only be punished once, then the first claimant to get an award is the first and only winner. The Court is not inclined to permit the sacrifice of one aggrieved party's claim for the sole benefit of another aggrieved party.

Because of the uncertainty under Missouri law as to whether a single defendant can be liable for more than one award of punitive damages, the plaintiffs who have intervened move this Court to abstain from ruling on the motion for class certification until after a Missouri appellate court has resolved the question. It is this uncertainty, however, which requires this Court to refrain from abstaining. So long as the question is unsettled, the spectre of a limited fund remains. Even after that particular question is resolved by the courts of Missouri, the possibility of a limited fund might still exist. The Court, therefore, denies the intervenors' motion to abstain from certifying a Rule 23(b)(1)(B) class action.

It is the primary concern of this Court that legitimate claimants receive recompense for the actual damages that they have suffered. Because of this overriding concern, the Court will permit the continued settlement of claims even though each settlement diminishes the funds available to pay for punitive damages. Though the Court

considers an award of punitive damages secondary to compensation for actual damages, a claimant's interest in exacting punishment against a deserving defendant is recognized by the law and must be protected. Only a single class-wide adjudication of the issues of liability for and amount of punitive damages can protect the interest of every victim in receiving his or her just share of any punitive damage award.

There is one final consideration that indirectly bears on this Court's decision to certify a Rule 23(b)(1)(B) class action. Those counsel who presently represent more than one client and who have sought punitive damages on behalf of each of those clients face a potential conflict of interest. In the context of a limited fund, an attorney who represents more than one client may be put in a conflicting position when forced to decide which case to proceed with first. *See* Disciplinary Rule 5-105(B) and Rule 5-105(C). The interests of one client may ultimately be sacrificed for the benefit of another client. Even if a limited fund did not exist, if Missouri law precludes multiple awards of punitive damages against a single defendant, the same result obtains. Plaintiff-intervenors assert that the conflict is readily resolved through full disclosure to their clients and eventual settlement of their cases. One of the attorneys for the intervenors, however, admitted at the class certification hearing that he had not disclosed the potential conflict to his clients. The Court further believes that counsel who represent more than one client may still be in a position of conflict if they must advise their clients to settle in order to insulate themselves from a conflict of interest on the punitive damages claims. The Court is mindful that counsel must always avoid even the mere appearance of impropriety.

Thus, since a class-wide resolution of the punitive damages issues protects not only the class members from the spectre of an exhausted fund, but may also resolve

the potential conflicts of interest faced by counsel who represent more than one punitive damage claimant, the Court deems it wholly appropriate to certify a Rule 23(b)(1)(B) class action on the issues of liability for and amount of punitive damages.

IV. *Intervenors' Motion to Disqualify*

On January 19, 1982, the plaintiffs-intervenors filed a motion, in accordance with 28 U.S.C. § 455, in which they asked the Court to disqualify itself from the skywalk litigation on the ground that its impartiality might reasonably be questioned. The motion is presumably generated from a series of conversations which counsel for the intervenors engaged in with counsel for plaintiff Stover.

In the course of evaluating the issues raised by the certification of a class action in the skywalk litigation, the Court commenced a survey of its records to determine which plaintiffs, who have filed suit in this Court, could serve as representatives of a class action. The Court noticed that plaintiffs Stover, Johnson, Vrabel, Grigsby and Abernathey could serve as class representatives. Court records reflected that only plaintiff Johnson, an intervenor and an initiator of the disqualification motion, is fervently opposed to the certification of a class action. With respect to the other four parties, the Court noticed that its records did not indicate what positions these parties held concerning the certification question. Before naming these parties as class representatives on the Court's own motion, the Court deemed it courteous to inquire as to their respective positions. To that end, the Court first contacted counsel for plaintiff Stover.

Counsel for plaintiff Stover were informed that the Court was contemplating naming their client as one of the representatives of a class action if the Court decided to certify a class action. The Court inquired as to their position on the certification issue. Counsel for Stover

were not able to give the Court an immediate answer and advised the Court that they could publish their client's position within ten days as they were scheduling a settlement conference with defense counsel.

Before the Court was able to inquire about the respective positions of the other three parties, counsel for the intervenors moved this Court to disqualify itself from the skywalk litigation, alleging that the Court's survey had given plaintiff Stover an advantage in settling her case and, thus, raised the question of whether the Court's impartiality might reasonably be questioned. Though this Court, to whom the motion to disqualify was addressed, presumably knows more about the factual background of its involvement in matters that form the basis of the motion than do the movants, *Laird v. Tatum*, 409 U.S. 824, 824 n. 1 (1972) (Memorandum of Mr. Justice Rehnquist), the Court considers the motion as if the allegations are true.

The intervenors have alleged that this Court informed counsel for Stover that a class action would be certified, that Stover would serve as the representative of the class members and that an order certifying a class action would not be issued on January 15, 1982. The intervenors further allege that plaintiff Stover gained an advantage not available to the intervenors because she knew that she did not have to settle her case before January 15, 1982 and that she could pressure the defendants into paying her a premium to keep her from becoming a class representative.

Assuming that all of these allegations are entirely true, even though they are not, the Court must scrutinize its impartiality as a judicial officer under Section 455(a) which provides that this Court shall disqualify itself from any proceeding in which its "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). While disqualification is certainly not automatically required merely upon the filing of an affidavit, *Mavis v. Commer-*

cial Carriers, Inc., 408 F. Supp. 55, 61 (C.D. Cal. 1975), it is incumbent on this Court to determine whether this is a proceeding in which its impartiality might be questioned. The standard of general disqualification is one of reasonableness and is not interpreted to include a "spurious or loosely based charge of partiality." *Mavis, supra*, at 61. The 1974 amendments to 28 U.S.C. § 455 codified Canon 3C of the American Bar Association Code of Judicial Conduct. In so providing, Congress cautioned:

> While the proposed legislation would remove the "duty to sit" concept of present law, a cautionary note is in order. No judge, of course, has a duty to sit where his impartiality might reasonably be questioned. However, the new test should not be used by judges to avoid sitting on difficult or controversial cases.
>
> At the same time, in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants sought not to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choosing.

H.R. Rep. No. 93-1453, House Judiciary Committee, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Ad. News 6355 (emphasis in original).

In applying the objective standards established by Congress in Section 455(a), the Court finds the legislative history enlightening. The decisions of other courts that have faced disqualification motions provide some guide-

lines, *see* Federal Judicial Conference, *Decisions Construing the Judicial Disqualification Statute* (1977), but those decisions, unlike decisions governing other issues of law, cannot directly bear on the question that this Court must resolve. *Bradley v. Milliken*, 426 F. Supp. 929, 934 (E.D. Mich. 1977). Even though introspection might dictate disqualification or qualification where other judges, who necessarily have incomplete knowledge, could reach alternative conclusions, the cases construing Section 455(a) illustrate the wisdom of having this judge resolve, in the first instance, the question of his own disqualification. *Id. citing United States v. Mitchell*, 377 F. Supp. 1312, 1323 n.8 (D.D.C. 1974) (Sirica, C.J.). The legislative history implies the same.

The intervenors assert that this Court was no longer impartial in this case when it inquired as to the position of plaintiff Stover on the issue of class certification. According to intervenors, plaintiff Stover gained an unfair advantage in the settlement of her claims. The advantage was presumably gained through knowledge that an order certifying a class action would not be issued on January 15, 1982. The Court has never imposed a deadline for the issuance of any of its orders in any case. The intervenors do not point to any evidence which demonstrates that the Court had bound itself to resolve the class certification on any particular date. The Court had anticipated resolving the certification issues and setting the discovery schedule by mid-January, but a series of motions filed by the intervenors concerning the certification issue have been filed throughout the month of January. Each of these required and have received the Court's attention. The Court, mindful of the great importance of these suits to the people of Kansas City, has tried to process the motions filed in this case as fast as practicable and will continue to do so.

Intervenors have not, and cannot, show that this Court had guaranteed that an order would be filed on January 15, 1982, or that the merits of this case were discussed

with anyone. Thus, all parties "labored" under the same "supposed" disadvantages. The intervenors assert that they were facing the pressure of a January 15, 1982 settlement deadline. As previously stated, the pressure was self-generated and based on speculations rampant in the legal community. The intervenors had no knowledge of when an order would be issued and did not know what this Court's position would be with respect to the continued settlement of their cases. As this order makes clear, the fear that settlements would be halted by this Court did not materialize. The intervenors likewise assert that the defendants would cease negotiating settlements when an order was issued. The settlement postures of each defendant have not been hampered by this Court and are controlled by the defendants.

It is finally argued by intervenors that plaintiff Stover, knowing that she might be selected as a class representative, could pressure the defendants into a lucrative settlement. This argument presumes that the able defense counsel of this community are susceptible to such pressure and that they would want to "buy-off" a potential class representative. While intervenors are to be commended for asserting the interests of those defendants presently engaged in the settlement process, they have not shown that Stover received more for her claim than her claim was worth. In fact, her case was not settled. As the discussion of the allegations suggests, the intervenors, in an attempt to avoid a potentially adverse decision, have fashioned these supposed disadvantages out of the winds of speculation.

The Court is alert to the possibility that those who challenge its impartiality are in fact seeking to avoid the consequences of an adverse decision. Though the Court was never sure of what ruling it would make until this order was drafted and entered, the Court did intimate at the December 10, 1981 certification hearing that it was impressed by the availability of the class action device in

the skywalk suits. The intervenors, in the representation of their clients' interests, have been the most vocal opponents of class certification. While the Court applauds their zealous representation, it cannot ignore the fact that intervenors truly want to avoid the consequences of an adverse decision and would welcome the opportunity to relitigate the certification issue before another judge. The Court is also cognizant that no active judge in residence of the Western District can accept responsibility for presiding over this case by reason of their previous disqualification due to conflicts of interest.

Even if every allegation made by the intervenors was founded on the truth, this Court concludes that a reasonable person, after considering all of the circumstances, would not question the impartiality of this Court. Thus, the intervenors' motion to disqualify this Court from the continued conduct of this litigation is denied.

V. *Conclusion*

In order to expeditiously adjudicate the issues raised by this skywalk litigation with a minimum of repetition, expense and delay, the Court firmly believes that the creation of a Rule 23(b)(1)(A) class action on the issues of liability for compensatory and punitive damages, and a Rule 23(b)(1)(B) class action on the issues of liability for and amount of punitive damages best serves the diverse interests of both plaintiffs and defendants. Legitimate claimants may negotiate and execute settlement agreements with those defendants who have vociferously urged this Court to allow the settlement process to continue. Those claimants who want to exact payment for allegedly punishable acts must forego the settlement process and await the trial of the punitive damage issues.

Accordingly, it is hereby

ORDERED that the motion to disqualify is denied. It is further

ORDERED that plaintiff Riley's motion to certify a class action is denied. It is further

ORDERED that a class action is certified and that plaintiffs Stover, Vrabel, Grigsby and Abernathey shall serve as the representatives of the class. It is further

ORDERED that counsel for plaintiff Riley shall serve as lead counsel and that counsel for plaintiffs Stover, Vrabel, Grigsby and Abernathey shall assist lead counsel. It is further

ORDERED that other interested attorneys who would like to be considered as counsel for the class and who have not previously informed this Court of their position have until seven (7) days after the date of this order to submit their names for service as class counsel. It is further

ORDERED that the intervenors' motion for interlocutory appeal is denied. It is further

ORDERED that the intervenors' motion for abstention is denied. It is further

ORDERED that discovery be completed by July 1, 1982, and that the trial of this action be commenced on August 15, 1982.

/s/ Scott O. Wright
SCOTT O. WRIGHT
United States District Judge

Kansas City, Mo.

January 25, 1982.

APPENDIX E

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for

the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class,

shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. (As amended Feb. 28, 1966, eff. July 1, 1966.)

Office - Supreme Court, U.S.
FILED
OCT 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-217

In the Supreme Court of the United States

October Term, 1982

SHIRLEY STOVER, *et al.*,
Petitioners,

vs.

MELANIE HANSON JOHNSON AND GERARD STANLEY JOHNSON, *et al.*, AND JACQUELINE N. RAU,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS MELANIE HANSON JOHNSON AND GERARD STANLEY JOHNSON, *et al.*, IN OPPOSITION

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Gerard Stanley Johnson, et al.

QUESTIONS PRESENTED

1. Did the District Court's Order of January 25, 1982, enjoining individual class members from proceeding with pending state court suits and settling their claims for punitive damages constitute an appealable order under 28 U.S.C. § 1292(a)(1)?

2. Does the Anti-Injunction Act, 28 U.S.C. § 2283, prohibit a federal district court from enjoining individual members of a mandatory class from proceeding with pending state court suits, whether by settlement or otherwise?

LIST OF PARTIES

Parties to the proceedings in the Eighth Circuit were: Shirley Stover;*+ The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri;+ Jacqueline N. Rau;* Melanie Hanson Johnson, Gerard Stanley Johnson, and other state and federal court plaintiffs;+ Crown Center Redevelopment Corporation;*+ Hallmark Cards, Inc.;*+ Hyatt Corporation;*+ and Hyatt Hotels Corporation.*+

The Plaintiffs' Liaison Committee appointed by the state court participated as *amicus curiae*.

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* Party to No. 82-1207, Appeal of Jacqueline N. Rau.

+ Party to No. 82-1181, Petition for Mandamus of Melanie Hanson Johnson and Gerard Stanley Johnson, *et al.*

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OPINIONS BELOW

The January 25, 1982, Order of the District Court is reported at 93 F.R.D. 415 (W.D. Mo. 1982). The opinion of the Court of Appeals for the Eighth Circuit is reported at 680 F.2d 1175 (8th Cir. 1982).

STATEMENT

On July 17, 1981, two skywalks collapsed at the Hyatt Regency Hotel in Kansas City, Missouri, killing 114 persons and causing physical injury to approximately 220 others. The vast majority of the lawsuits arising from the skywalks collapse were filed in the Circuit Court of Jackson County, Missouri. As of August 5, 1982, 187 cases, representing the claims of approximately 200 victims, had been filed in the Missouri state court. Only eighteen cases were filed in the United States District Court for the Western District of Missouri; of these, some have been dismissed and refiled in state court and some have been settled. Five cases presently remain on file in the District Court.

In September, 1981, both the state and the federal courts consolidated their respective cases for discovery and appointed state and federal Plaintiffs' Liaison Committees to proceed with consolidated discovery and other matters. Until the District Court's class certification order of January 25, 1982, the Plaintiffs' Liaison Committees had conducted and were proceeding with substantial discovery. Comprehensive interrogatories were served on defendants, who responded with thousands of pages of answers. In response to plaintiffs' document requests, defendants produced several hundred thousand pages of documents, which were placed in a depository jointly funded by plaintiffs and defendants. Plaintiffs' Liaison Committees also negotiated with defendants and the National Bureau of Standards for extensive testing of the skywalks debris.[1]

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1. *See In re Skywalk Cases*, No. CV81-15244 MCF (Cir. Ct. Jackson County, Mo. Order of June 3, 1982) (Resp. A. 4a-14a).

References to "Pet. A." refer to the appendices attached to the Petition for Writ of Certiorari. References to "Resp. A." refer to the appendices attached to this Brief in Opposition.

On September 1, 1981, Molly Riley, a victim with superficial injuries, filed a complaint in the District Court requesting that a class action of all skywalks victims be certified under Rule 23.[2] Among other things, Riley sought certification of a mandatory class under Rule 23(b)(1)(B) on the issue of defendants' liability to the class for punitive damages. The purpose of this class was to seek recovery of a single sum of punitive damages to be awarded in favor of the class as a whole. The alleged justification for a mandatory class action was Riley's concern that the aggregate assets and liability insurance coverage of all defendants would be exhausted before all claims for actual and punitive damages were satisfied. Riley based her argument solely upon an allegation by defendant Hyatt Corporation that the total *prayers* of all lawsuits on file exceeded the $333 million in insurance coverage available to defendants.[3]

Respondents Melanie Hanson Johnson, Gerard Stanley Johnson, and other victims of the skywalks collapse intervened in Riley's action to oppose class certification. At the December 10, 1981, hearing, opposition to class certification was overwhelming. Affidavits of 175 individual state and federal plaintiffs opposing certification of any class action were filed with the District Court. All defendants opposed class certification. Only plaintiff Riley then supported the class. Riley adduced no evidence at the hearing to show that the actual value of victims' claims exceeded or even remotely approached defendants' ability

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2. Riley initially filed a class action petition in state court, *Riley v. Crown Center Redevelopment Corp., et al.*, No. CV81-16322 (Cir. Ct. Jackson County, Mo. filed July 30, 1981), but dismissed it on September 24, 1981, after her federal complaint was on file.

3. *See* Petition for Declaratory Judgment and Incidental Relief, *Hyatt Corp. v. Occidental Fire & Casualty Co. of North Carolina, et al.*, No. CV81-32809 (Cir. Ct. Jackson County, Mo. October 2, 1981), at 9.

to respond to damage judgments, either through liability insurance coverage or other assets.

On January 25, 1982, the District Court certified a mandatory class action on several issues: (1) under Rule 23(b)(1)(A) on liability issues, based on a finding that individual suits would create a risk of inconsistent results;[4] and (2) under Rule 23(b)(1)(B) on punitive damage issues—both liability and amount—based on the court's concern that the "limited fund" composed of the insurance coverage and aggregate assets of all defendants might prove insufficient to satisfy all punitive damage judgments.[5]

Also contained in the District Court's Order of January 25, 1982, is the specific language that enjoined the settlement of all skywalks-related punitive damage claims, including long-pending state court lawsuits: "Those claimants who want to exact payment for allegedly punishable acts must forego the settlement process and await the trial of the punitive damages issues." 93 F.R.D. at 428 (Pet. A. 60a). The District Court's intention regarding the injunctive effect of that order on the prosecution of individual state court cases, whether by trial or settlement, was reiterated in the court's subsequent, more explicit language. "Individual unnamed class members may not conduct the prosecution of any claim." Order of January 29, 1982 (Resp. A. 2a).

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4. Even Judge Heaney's dissent recognized the District Court's misapplication of Rule 23(b)(1)(A) to a group of separate tort actions for unliquidated money damages. 680 F.2d at 1197 n.8 (Pet. A. 34a n.8).

5. The District Court considered that the "fund" of resources available to defendants to respond to damage judgments might be "limited" by either or both (1) the possible insolvency of defendants (although no such evidence was adduced at the December 10, 1981, hearing); and (2) the operation of Missouri law to restrict more than a single award of punitive damages against any defendant (Pet. A. 33a). *But see Rinker v. Ford Motor Co.*, 567 S.W.2d 695 (Mo. App., D.K.C. 1978) (rejecting under Missouri law defendant's public policy argument against multiple punitive damages liability exposure).

The practical effect of the District Court's January 25, 1982, Order was to bring the individual prosecution and settlement of both federal and state court skywalks cases to an immediate halt. Prior to the entry of that order, 122 claims, including cases in both state and federal court, had been settled for total amounts in excess of $18 million. After January 25 and for as long as the District Court's Order of January 25, 1982, remained in effect, not a single skywalks claim was settled.[6]

Respondents challenged both the class certification and the injunctive aspects of the District Court's Order of January 25, 1982. Melanie Hanson Johnson, Gerard Stanley Johnson, the others filed a petition for a writ of mandamus in the United States Court of Appeals for the Eighth Circuit requesting that the class certification be set aside on numerous grounds.[7] Pursuant to 28 U.S.C. § 1292(a)(1), Jacqueline N. Rau appealed the District Court's injunction against the settlement or other prose-

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6. Immediately after the Eighth Circuit vacated the Order of January 25, 1982, the settlement process recommenced. In the period from June 7 to August 5, 1982, 47 additional claims were settled for nearly $5.5 million. As of August 5, 1982, a total of 169 claims had been settled for more than $24 million.

7. The petition for a writ of mandamus filed by respondents Johnson argued that the class certified by the District Court was inherently defective because its primary function was to obtain a single, class-wide award of punitive damages. Issues raised but not reached by the Eighth Circuit included the following: (1) the District Court's erroneous application of Rule 23(b)(1)(A) to a group of tort claims for unliquidated money damages; (2) the absence of a sufficient factual record to justify a finding that a "limited fund" exists (*see In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, Nos. 81-4040, et al., slip op. at 8 (9th Cir. June 18, 1982)); (3) the District Court's misinterpretation of Missouri law regarding multiple awards of punitive damages against a single defendant; (4) the "fluid recovery" nature of the District Court's proposed remedy which is not authorized under Rule 23; and (5) the legal impossibility of awarding and dividing a single amount of punitive damages awarded to the class as a whole without violating defendants' constitutional due process rights and plaintiffs' constitutional rights to trial by jury.

cution of her state court action. She contended, among other things, that the injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283. In the alternative, respondent Rau sought a writ of mandamus, requesting the same relief as respondents Johnson, *et al.* The petition for mandamus and the appeal were consolidated by the Eighth Circuit.

On June 7, 1982, the Eighth Circuit vacated the District Court's Order of January 25, 1982. The Court of Appeals held that the *specific language* of the District Court's Order constituted an injunction appealable as of right under 28 U.S.C. § 1292(a)(1). "In the present case, contrary to the class's assertion, the district court *expressly prohibited* class members from settling their punitive damage claims . . . ." 680 F.2d at 1180 (Pet. A 9a) (emphasis added).[8] The court further held that this injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283, by enjoining the prosecution or settlement of pending state court litigation.

Rehearing and rehearing *en banc* were denied without comment on July 9, 1982.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari misstates the scope of the Eighth Circuit's decision on the two points briefed. That decision cannot be read as holding that *every* order certifying a mandatory class action constitutes an injunction appealable as of right. On the contrary, the Eighth Circuit's decision is extremely narrow. It holds only that the *specific language* of the District Court's Order of

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8. Judge Heaney's dissent did not disagree with the majority's conclusion that the language in the District Court's January 25, 1982, Order was an injunction. 680 F.2d at 1188 n.1, 1192 n.16 (Pet. A. 19a n.1, 34a n.16).

January 28, 1982, constituted an injunction of pending state court cases. 680 F.2d at 1180 (Pet. A. 9a). The words and actions of the District Court demonstrate that its class certification order was also an injunction. The Eighth Circuit decision is entirely consistent with the recent decisions of this Court.

Petitioner's claim that the Eighth Circuit's decision eviscerates Rule 23 is without merit. The decision below turned solely on the specific fact situation presented. The decision does not hold that all orders certifying mandatory class actions constitute injunctions. The Anti-Injunction Act, 28 U.S.C. § 2283, was applicable in this case because the District Court specifically enjoined pending state litigation. If the Eighth Circuit had held otherwise, its opinion would have been in direct conflict with the decisions of this Court. In the rare instance in which a class certification order entered by a federal district court also enjoins pending state court litigation, the plain language of the Anti-Injunction Act is violated. The vast majority of class actions certified in federal court, however, involve either actions within exclusive federal jurisdiction or those that do not involve the keen individual interests likely to lead claimants to prosecute their claims in state court. As discussed below, petitioner has failed to present any "special and important reasons" justifying review by this Court.[9] Supreme Court Rule 17.1.

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9. There are two additional grounds for denying the writ. First, petitioner abandoned the class certified on January 28, 1982, and sought certification of a *different* class in the District Court. Second, the basis for federal jurisdiction over this action was diversity of citizenship between petitioner Stover and defendants. In early September, 1982, however, petitioner settled her individual action. Petitioner has been the only known plaintiff willing to serve as representative who was diverse from all defendants. *See* 93 F.R.D. at 419, 425-26 (Pet. A. 41a, 55a-56a); 680 F.2d at 1179 n.9 (Pet. A. 6a); Order and

(Continued on following page)

ARGUMENT

I. ON THE FACTS OF THIS CASE, THE DISTRICT COURT'S ORDER OF JANUARY 25, 1982, CONSTITUTED AN INJUNCTION APPEALABLE AS OF RIGHT.

Petitioner misleads this Court when she claims the Eighth Circuit's decision holds that the mere certification of a mandatory class action constitutes an injunction within the meaning of 28 U.S.C. § 1292(a)(1). It was the District Court's explicit prohibition against the settlement of punitive damage claims by class members, not the class certification order itself, that constituted the injunction.

It is irrelevant that the District Court did not label its order an injunction; the determination whether an order is an injunction depends upon its substantial effect rather than its terminology. *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942); *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775, 778 (3d Cir. 1975). In this case, the effect of the order was injunctive. Indeed, everyone connected with this litigation has agreed that the District Court intended to and did enjoin individual settlements of punitive damage claims. The District Court's order is itself filled with statements of this intent. All members of the Eighth Circuit panel, includ-

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Footnote continued—

Memorandum of September 17, 1982, at 4-5 (W.D. Mo. 1982) (reciting the fact of petitioner's settlement and denying certification of a Rule 23(b)(3) class for lack of a diverse representative). Without complete diversity between the class representative and the defendants, the federal courts have no jurisdiction over this matter and it must be dismissed. Rule 23 does not apply unless subject matter jurisdiction exists. *Cf. Zahn v. International Paper Co.*, 414 U.S. 291 (1974). Therefore, certiorari should be denied.

ing dissenting Judge Heaney, found that the restraint on settlement was an injunction. 680 F.2d at 1180, 1185 n.1 (Pet. A. 9a, 19a-20a n.1). Petitioner herself has admitted that the District Court's order enjoined class members from settling punitive damage claims individually. In a memorandum filed with the District Court on February 10, 1982, petitioner stated: "[T]he short answer . . . is that this Court's Order and Memorandum certifying the class *forbids* individual settlements of claims for punitive damages." (Resp. A. 17a (emphasis supplied). Petitioner's counsel reaffirmed this view of the effect of the order in oral argument before the Eighth Circuit on March 12, 1982.

> Mr. Younger: Now, in certifying a nonopted [sic] out class, as Mr. Wolff conceded, and as I would concede, the practical effect of the order is to make it improper for members of the class to take certain steps in the state court.

Transcript of Proceedings before the Eighth Circuit Court of Appeals, March 12, 1982, Nos. 82-1181 and 82-1207, at 81.

Petitioner's arguments concerning this Court's strict construction of the finality requirement, in furtherance of the congressional policy against piecemeal appeals contained in 28 U.S.C. § 1291, are inapposite. In § 1292(a)(1) Congress has specifically provided for exceptions to the final decision requirement by allowing immediate appeals from orders "granting, continuing, modifying, refusing or dissolving injunctions." Moreover, the Eighth Circuit's decision is in harmony with a recent Supreme Court decision involving appealability under § 1292(a)(1) of an order not specifically labeled as an injunction.

In *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), this Court found that a district court's refusal to enter

a consent decree encompassing injunctive relief was immediately appealable under § 1292(a)(1) because it had the "practical effect" of refusing an injunction. *Id.* at 85. Like the refusal of an injunction, the refusal to enter the decree would have "serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955).

> First, petitioners might lose their opportunity to settle their case on the negotiated terms.
>
> • • •
>
> By refusing to enter the proposed consent decree, the District Court effectively ordered the parties to proceed to trial and to have their respective rights and liabilities established within limits laid down by that court. Because a party to a pending settlement might be legally justified in withdrawing its consent to the agreement once trial is held and final judgment entered, the District Court's order might thus have the "serious, perhaps irreparable, consequence" of denying the parties their *right* to compromise their dispute on mutually agreeable terms.

Carson v. American Brands, *supra*, at 86-88 (footnotes omitted) (emphasis supplied). Respondents agree with petitioner that the mere certification of a class, standing alone, "has no irreparable consequences and is therefore outside the ambit of § 1292(a)(1)." (Pet. 9) It is, however, the District Court's injunction against individual settlement that creates the irreparable injury. As with the class members in *Carson*, individual skywalks victims were suffering the "serious, perhaps irreparable, consequence" of being denied the right to settle their claims on terms negotiated by them and were instead being forced to trial in a forum not of their choosing.

For these reasons, petitioner's contentions that the Eighth Circuit's decision is in conflict with *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978), and *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), are incorrect. In *Gardner*, this Court determined that the mere denial of class certification in a case involving a prayer for injunctive relief did not constitute the denial of an injunction under 28 U.S.C. § 1292(a)(1). In reaching this result, this Court pointed out that the district court's order did not affect the merits of the would-be representative's own claim or pass on the legal sufficiency of any claims for injunctive relief. Therefore, the order denying class certification had no irreparable effect. The District Court's order in the skywalks cases, on the other hand, by preventing class members from settling their punitive damage claims, gravely affected the victims' rights.

The *Gardner* Court also noted that the petitioner there had *not* sought a preliminary injunction. The Court then distinguished *Gardner* from *Jenkins v. Blue Cross Mutual Hospital Ins., Inc.*, 538 F.2d 164 (7th Cir. 1976), *cert. denied*, 429 U.S. 986 (1976). In *Jenkins*, the Seventh Circuit found a denial of class certification to be appealable under § 1292(a)(1) because the order directly controlled the subsequent refusal to grant a preliminary injunction. *Jenkins* recognized the difference between a mere refusal to certify a class action and the denial of an injunction intimately related to the class issues. The former order is not appealable as of right, while the latter is. The situation created by the District Court's Order of January 25, 1982, is analogous to that presented in *Jenkins*.

Petitioner's reliance upon *Coopers & Lybrand v. Livesay* is similarly misplaced, for *Coopers & Lybrand* dealt not with appealability under § 1292(a)(1), but rather with

whether the denial of class certification constituted a "final decision" under 28 U.S.C. § 1291. The portion of the *Coopers & Lybrand* opinion quoted by petitioner was a criticism of the case-by-case analysis used by the courts of appeals in applying the "death knell" doctrine as an exception to the finality requirement of § 1291. None of these considerations is pertinent to a discussion of § 1292 (a)(1).

The Eighth Circuit's decision is in complete harmony with the principles of *Carson* and *Gardner*. It held that the District Court had enjoined all class members from settling punitive damage claims. Such an injunction is appealable as of right under 28 U.S.C. § 1292(a)(1).

II. THE NARROW RULING OF THE COURT OF APPEALS WILL HAVE LITTLE IMPACT UPON THE ADMINISTRATION OF RULE 23.

A. The Eighth Circuit's Decision Will Affect Very Few Cases.

There will be few, if any, cases in the future which will present the precise issues resolved by the Eighth Circuit in the skywalks litigation. The only persons likely to be affected by the decision below are the skywalks litigants themselves.

The unique facts of this case are crucial to an understanding of the scope of the Eighth Circuit's opinion. As the statement of facts indicates, the skywalks cases are fundamentally state court cases. All but eighteen of 187 actions were initially filed in state court; only five federal cases remain. This is not a situation in which a single maverick state court litigant has acted to deprive all other class members of their choice of a federal forum and a class action procedural device. Indeed, the opposite is much

closer to the truth. Only two class members (Molly Riley and petitioner Shirley Stover) unconditionally support the federal class.

In its January 25, 1982, Order, the District Court did more than enjoin a few newly-filed state cases. The Court of Appeals' opinion details the consolidation orders in both state and federal court and the massive amounts of discovery and other pretrial activities that had been conducted during the *six-month* period prior to the District Court's injunctive order. 680 F.2d at 1177-78, 1180 (Pet. A. 3a-4a). Even assuming that a federal district court would ever be justified in enjoining the prosecution and settlement of the claims of members of a mandatory class, there will rarely be a mandatory class in which the overwhelming majority of class members had long before chosen to proceed with their claims in state court and in which "[t]he state court cases had been filed, consolidated, and discovery had begun," 680 F.2d at 1180, prior to the entry of the injunction.

A factor highlighting the narrowness of the Eighth Circuit's decision is the genesis of the skywalks cases in a mass disaster. Virtually every court presented with the issue has found that a class action is not the proper vehicle for the prosecution of claims arising from mass disasters. *See, e.g., Causey v. Pan American World Airways, Inc.*, 66 F.R.D. 392 (E.D. Va. 1975); *Marchesi v. Eastern Airlines*, 68 F.R.D. 500 (E.D.N.Y. 1975); *Daye v. Pennsylvania*, 344 F. Supp. 1337 (E.D. Pa. 1972), *aff'd*, 483 F.2d 294 (3d Cir. 1973), *cert. denied sub nom. Meyers v. Pennsylvania*, 416 U.S. 946; *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76 (E.D. Pa. 1970). It is in this kind of litigation that the interests of individual litigants in controlling their own substantial damage claims outweigh any perceived efficiency obtained through the class action

device. In the rare instances in which a class has been certified in a case involving large numbers of personal injury claimants, Rule 23(b)(3) has been used, *see, e.g., In re "Agent Orange" Products Liability Litigation*, 506 F. Supp. 762, 787 (E.D.N.Y.), *rev'd on other grounds*, 635 F.2d 987 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow Chemical Co.*, 102 S. Ct. 980 (1981); *Payton v. Abbott Labs*, 83 F.R.D. 382, 386-87 (D. Mass. 1979), and the issue involved here simply does not arise. In most mandatory federal class actions, as in federal class actions generally, very few class members have ever bothered to file a separate state proceeding, much less to pursue it as vigorously as the skywalks victims have pursued their state court cases in this litigation.

In short, there will be few, if any, situations in which a federal district court properly certifies a mandatory class action[10] involving large numbers of state court plaintiffs who have already engaged in extensive state court discovery and also enjoins those state court plaintiffs from settlement or other prosecution of their state court claims. The impact on the administration of Rule 23 of the Eighth Circuit's decision will be minimal. The disastrous picture painted by petitioner is without substance.

B. The Limited Fund Doctrine of Rule 22 Interpleader Actions Is Inapplicable to This Case.

Petitioner attempts to analogize this mass disaster litigation and the District Court's mandatory class action to Rule 22 interpleader actions, in which an injunction may issue to halt pending state proceedings without vio-

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10. Certification of a mandatory class pursuant to Rule 23(b)(1)(B) was improper in this case on a number of independent grounds. *See* note 7, *supra*.

lating the Anti-Injunction Act. This argument is unpersuasive. As the Eighth Circuit's opinion noted, interpleader jurisdiction depends on the existence of identifiable property or a closed fund. 680 F.2d at 1182 (Pet. A. 13a). Interpleader is not appropriate in cases in which the "fund" consists of the defendant's assets, because a defendant's liability, unlike the known extent of a closed fund, is in theory limitless. *See General Electric Credit Corp. v. Grubbs*, 447 F.2d 286, 289-90 (5th Cir. 1971), *rev'd on other grounds*, 405 U.S. 699 (1972).

Aside from the skywalks cases, only two other courts have certified mandatory class actions in mass disasters on a "limited fund" theory. In the first, *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977), *petition for mandamus denied sub nom. Union Light, Heat & Power Co. v. United States District Court*, 588 F.2d 543 (6th Cir. 1978), *cert. dismissed*, 443 U.S. 913 (1979), parallel state litigation proceeded in cooperation with the federal class, and no injunction against the state proceedings was ever reported. The second was the *"Dalkon Shield"* litigation, and as petitioner correctly points out, the class certification order was vacated by the United States Court of Appeals for the Ninth Circuit on June 18, 1982. *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, Nos. 81-4648, *et al.* (9th Cir. June 18, 1982). Petitioner's statement, however, that none of the reasons for that reversal applies to the skywalks litigation is not correct. In vacating the district court's mandatory class, the Ninth Circuit noted that its own precedent prohibits certification of mass tort claims under Rule 23(b)(1)(B) unless separate actions "inescapably will alter the substance of the rights of others having similar claims." *McDonnell Douglas Corp. v. United States District Court, C.D. of California*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied sub nom. Flanagan v. McDonnell Douglas*

Corp., 425 U.S. 911 (1976), quoting *LaMar v. H & B Novelty and Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973) (emphasis supplied). The *"Dalkon Shield"* litigation did not satisfy this stringent test. *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, *supra*, slip op. at 6. If the defendant is an ongoing business entity, it is doubtful that the "limited fund" theory will suffice to support class certification. *See* Schroeder, *Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 67 Iowa L. Rev. 917, 958-63 (1982).

C. The District Court's Injunction Violates the Anti-Injunction Act.

This Court has given the Anti-Injunction Act an extremely strict construction.

> This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions.

Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 515-16 (1955). More recently, this Court has similarly admonished:

> [A]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.

Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 297 (1970). The purpose of this prohibition against injunctions of state court proceedings is to "forestall the inevitable friction between the state

and federal courts that ensues from the injunction of state judicial proceedings by a federal court." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977). Only by a very strict construction can § 2283 accomplish its purpose.

Petitioner argues that the District Court's injunction nevertheless escapes the prohibition of § 2283 because it falls within the Act's exception for injunctions "necessary in aid of its jurisdiction." (Pet. 13). Not only is this argument without merit, it contradicts petitioner's other positions. In arguing that the District Court's order did not constitute an injunction, petitioner states that the certification of a federal class action does not prevent class members from freely pursuing separate actions in state court, citing *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775 (3d Cir. 1975) (Pet. 8). This statement impliedly recognizes that simultaneous state court actions involving the same subject matter do not impair federal jurisdiction. This being so, there is absolutely no reason for a federal court to enjoin the state court litigants, and any such injunction could not be necessary in aid of the federal court's jurisdiction.

Aside from the inconsistent arguments that petitioner raises, there is no legal basis for exempting the District Court's order from the Act's prohibition. Petitioner cites *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954), in support of her argument (Pet. 13). *Capital Service* involved proceedings before a federal agency vested by Congress with exclusive jurisdiction over labor matters. In this case, the District Court, pursuant to 28 U.S.C. § 1332, could have only *concurrent* jurisdiction over these state law tort claims.

More to the point is *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*, *supra*, also cited

by petitioner, in which this Court vacated an injunction because federal and state courts had concurrent jurisdiction over the subject matter. This Court has long held that a simultaneous *in personam* state action does not impair federal court jurisdiction over an action involving the same subject matter. *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922). *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775 (3d Cir. 1975), refused to apply the "in aid of jurisdiction" exception to allow the injunction of a prior state court action by a federal court in which a class suit involving the same subject matter was pending.

> The alleged inability of the various defendants to pay a judgment resulting from the federal class action if the Kentucky Attorney General is allowed to execute upon his judgment is not cause to create an exception to this general rule . . . . [T]he inability of defendants to pay a judgment, assuming it exists, still would not be sufficient justification to issue the federal injunction. The fundament of the rule forbidding federal courts from enjoining parallel *in personam* state proceedings is a recognition of the principle that absent statutory or constitutional directive, the state and lower federal courts are independent, and that a federal action is not superior to a state proceeding merely because of its federal character. As a corollary to this principle, judgments resulting from federal actions are not preferred to judgments resulting from state actions because of their federal character.

521 F.2d at 780 (citations omitted). *See also Piambino v. Bailey*, 610 F.2d 1306, 1334 (5th Cir. 1980), *cert. denied sub nom. Piambino v. Sylva*, 449 U.S. 1011 (1981) ("The fact that [defendant] might have fewer assets available

to satisfy any judgment entered as a result of the Florida federal litigation in no way affects the jurisdiction of the federal court.").

Given the strict construction required of the Anti-Injunction Act and petitioner's failure to show that the injunction falls within one of its specific exceptions, the ruling of the Eighth Circuit was correct. To reach any other decision would be to ignore this Court's admonition that any doubts as to the propriety of an injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed. *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 296-97 (1970).

CONCLUSION

The decision of the Court of Appeals for the Eighth Circuit is a narrow one which turns on the specific facts presented by the skywalks litigation. Petitioner has failed to show that the Eighth Circuit's opinion is erroneous in any respect.

Since the Eighth Circuit's decertification of the class action, approximately 50 additional claims have been settled, for a total of 160 claims settled. The state Plaintiffs' Liaison Committee has undertaken extensive discovery, and a consolidated trial of all the state court cases has been set for March 14, 1983. At present, cases representing 128 claimants are pending in state court, while only five cases remain pending in the District Court. Petitioner's attempt to wrest this litigation from the jurisdiction of the Missouri state courts on behalf of a handful of cases pending in federal court should not be condoned by this Court.

Respectfully submitted,

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September, 1982

APPENDIX

LAW OFFICES
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[illegible]

August 9, 1982

Honorable Scott O. Wright
District Judge
United States Courthouse
811 Grand Avenue
Kansas City, MO 64106

Dear Judge Wright:

I was informed approximately 1/2 hour ago that Justice Blackmun had denied our Petition to Recall the Mandate and to Stay said Mandate pending a decision on our Petition for Writ of Certiorari. Accordingly, I request that this Court consider our motion made in the alternative to modify the old class or certify a new class solely as a motion to certify a new class. If the Court would like any further briefing on the matter, counsel for the class would be happy to provide such forthwith.

Very truly yours,

Paul Martin Wolff

cc: All Counsel of Record

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IN RE FEDERAL SKYWALK CASES)

ORDER

Individual unnamed class members may not conduct the prosecution of any claim. The class is represented by class counsel who are responsible for the conduct of all claims of the class. No matters may be presented to this Court which concerns a member of the class unless it is presented by the counsel designated to handle the class action. The Clerk of the Court has been directed to reject any matters that are not being filed by counsel for the class or counsel for defendants. Only matters which pertain to the completed settlement of an unnamed class member's claim may be filed by those unnamed members.

The counsel appointed to represent the class are in charge of prosecuting the claims of the class. If any unnamed member of the class has a legitimate concern, that concern should be brought to the attention of the class counsel.

Accordingly, it is hereby

ORDERED that the Wicker motion to voluntarily dismiss certain defendants without prejudice is dismissed as improperly filed. It is further

ORDERED that the Johnson, et al. notice to take the deposition of plaintiff Stover and her counsel is quashed as improperly filed.

/s/ Scott O. Wright
Scott O. Wright
United States District Judge

Kansas City, Mo.

January 29, 1982.

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

IN RE: SKYWALK CASES	)	CV81-15244 MCF
	)	CIVIL DOCKET "T"

ORDER

On February 2, 1982 Plaintiffs' Liaison Committee filed in this Court on behalf of all plaintiffs a "Motion For an Order Directing That Depositions May Commence". Thereafter suggestions for and in opposition to said motion were filed, the last having been filed February 24, 1982.

It was the understanding of this Court that Plaintiffs' Liaison Committee did not want that motion set down for hearing or ruled on suggestions, but wanted the matter deferred. The Court understood that they were going to address the issue in their action filed in the United States Court of Appeals for the Eighth Circuit.

Thereafter Plaintiffs' Liaison Committee filed a mandamus action in the Missouri Court of Appeals for the Western District to compel this Court to rule that motion.

Upon receipt of the notice of the filing of the mandamus petition, this Court noted the apparent misunderstanding and set the motion for oral argument on May 27, 1982. At a meeting between Plaintiffs' Liaison Committee and Defendants' Liaison Committee the Court noted that the issues raised in the mandamus action in the Missouri Court of Appeals were raised by *wrongful death plaintiffs* only, who suggested that those plaintiffs should be permitted to proceed with depositions for the reason that they would be entitled to prove "aggravating circumstances" in their compensatory damage trial in the State

Court regardless of the outcome in either settlement or trial in the Federal District Court. Plaintiffs' Liaison Committee advised that this was the limited discovery they wished to pursue at this time and that they would amend their February 2, 1982 motion to so state. They have done so by filing an amended motion May 28, 1982.

Defendants' Liaison Committee, on the other hand, advised that they wanted their "Motion to Stay Proceedings" taken up and considered at the same time. That was so ordered.

Plaintiffs' Liaison Committee reminds the Court that through the cooperative effort of this Court and the Federal District Court, a Plaintiffs' Liaison Committee was appointed and consolidated discovery proceeded in both Courts with unusual cooperation between the Courts and *all* counsel. They remind the Court that great strides were made in discovery with unusual cooperation between all parties. They allege that prior to the class certification by the Federal District Court on January 25, 1982 the parties had settled 121 bodily injury and death claims through the payment of more than 18.6 million dollars to compensate victims and their families. Forty-one percent of the death claims, 35 percent of the minor personal injury claims and 26 percent of the claims of those hospitalized had been settled.

The classes certified by Judge Wright were certified for a limited purpose:

1. A class pursuant to Rule 23 (b)(1)(a) Federal Rules of Civil Procedure, to try the "issues of (defendants) liability (to class members) for compensatory damages".

2. A class pursuant to Rule 23 (b)(1)(b), Federal Rules of Civil Procedure, to try the "issues of (defen-

dants) liability (to class members) for *punitive damages* and the amount of punitive damages".

Plaintiffs' Liaison Committee points out the issues of the class members entitlement to compensatory damages and the amount thereof were not included in the class issues.

Subsequent to the class certification Plaintiffs' Liaison Committee petitioned for a Writ of Mandamus in the United States Court of Appeals for the Eighth Circuit asking that the classes as certified be decertified. That mandamus action has been briefed and argued by the parties, but not ruled.

The parties have favored this Court with a copy of all briefs filed in that action as they were filed.

In that mandamus action, Plaintiffs' Liaison Committee, speaking for 175 plaintiffs who either filed their cases in the State Court, or had claims pending, objected to the two class certifications. *ALL* defendants objected to the class certifications and argued that the Federal District Court exceeded its jurisdiction.

Plaintiffs' Liaison Committee advises that the history of progress since the certification is this:

A) There has been great antagonism between Plaintiffs' Liaison Committee and the group they represent and the lead counsel for the Class Action attorneys;

B) All plaintiffs' attorneys, other than Class Action attorneys, and counsel for all defendants argued for decertification of the two classes before the U. S. Court of Appeals for the Eighth Circuit;

C) Only ten depositions have been taken by Class Action attorneys since they began in March;

D) Over 90 plaintiffs who have cases pending in the State Court have not been permitted to participate in those depositions or give input or confer on strategy with lead Class Counsel;

E) Class Action attorneys have not counselled with Plaintiffs' Liaison Committee or sought any input in strategy on the use of experts;

F) It is reported in the *Kansas City Star* that Class Action attorneys have been discussing a proposed settlement for punitive damages in which they will request a fee of 2.4 million dollars and $500,000 expenses. This enormous fee which is requested by lead Class Counsel exemplifies one of the great differences between Plaintiffs' Liaison Committee and lead Class Counsel. They argue that lead Class Counsel has taken one relatively minor personal injury case and catapulted it into a huge fee. They say this conflict of objectives by lead Class Counsel is in violation of the interests of those seriously injured who are primarily interested in an adequate award. Particularly this is true they argue, when one considers that after settlement of the punitive damage issues, the liability for compensatory damages and the numerous issues involved therein may remain for determination at trial in the State Court;

G) Two of the Class Action attorneys have voiced objections to the premature settling of punitive damages and the amount of the proposed fee—one for the reason that it is too large and another because it is too small;

H) There continues to be greater and greater antagonism between lead Class Counsel and Plaintiffs' Liaison Committee;

I) More important than any other matter listed, is that all settlements have stopped.

Plaintiffs' Liaison Committee and all defendants place the blame for these irreconcilable conflicts between Plaintiffs' Liaison Committee and lead Class Counsel on the latter's position taken in his Motion in Limine filed in Federal District Court which illustrates the conflict. In that motion Class Action counsel complain that allowing individuals to settle their cases during the pending of the proceedings would have the "troubling consequence" of "unfairness" to Class Action counsel because such settlements might adversely affect the size of any possible punitive damages award and thereby reduce their attorney fees. Plaintiff's Motion in Limine at 14 N.7.

The interplay in the Hyatt litigation and the advocacy of the varying positions is part of our system of justice. Yet, there is a delicate balance that must be maintained and each group must respect the image of the system and make every effort to see that justice is done and, just as important, that the people involved feel that there has been justice.

Life is emotional. This sort of tragedy raises the height of those emotions. People have suffered grave and great losses. It is important to ALL of us that these lives be repaired with as much speed and delicacy as can be mustered.

It helps to determine the goals of the system of justice and the goals of the attorneys and attempt to meet them.

Plaintiffs' Liaison Committee argues that the fundamental requisite of what process is due under the law is a right in a mass disaster case involving serious personal injury or death to select your attorney, to select the defendants you want to sue, to determine your own trial strategy and finally to settle your lawsuit. They say that the opportunity to participate in your lawsuit is the core of justice.

They state that the certification improperly shifts the focus to the ancillary issue of punitive damages by giving that issue priority over the more urgent matter of compensation of the injured victims. This points up the fundamental conflict between the 178 plaintiffs who oppose the class and the court-appointed lead Class Counsel. There is a marked difference in the interests of those who have substantial claims for actual damages and the others in the class who will not obtain significant awards for actual damages. Those who have minor injuries can only obtain significant recovery through an award of punitive damages.

"It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent." 7C. *Wright and A. Miller*, Federal Practice and Procedure, §1768 at 638 (1972).

This Court will not address the merits of the class action or attempt to predict the outcome of those issues pending before the Court of Appeals for the Eighth Circuit.

It is important to address the question of what happens if that mandamus action is not ruled on in the immediate future or if the ruling is deferred until after a settlement is negotiated. In the event of a settlement of the punitive damage issue there will most certainly be an appeal or a collateral attack at which time the issues now before the Court will be ruled by the U. S. Court of Appeals for the Eighth Circuit.

Counsel for Hallmark Cards, Inc. in its brief before the Eighth Circuit noted a cautionary statement made by a leading commentator as to class action procedures. That is:

"It clearly would be a perversely wasteful expenditure of time and effort to go through the agony of class action certification, complete extensive discovery, negotiate and approve a settlement or actually adjudicate the merits of the case, and draft and enter a judgment only to have it unravelled three or five years later by someone who does not want to be bound by the result, claims that he or she was inadequately represented, and now wants a day in court." *Wright and Miller, supra*, at 29.

If that should happen, the people with serious injuries and deaths will have been forced to sit on the sidelines of the case while lawyers that they have not selected pursue their case for them, and may be deprived of proceeding with their case for several years, a clear injustice to them. This has happened in the case of *Vincent v Hughes Air West, Inc.*, 557 F. 2d 759 (9th Cir., 1977) where after five years of litigation the class was decertified.

In the event of decertification Plaintiffs' Liaison Committee would be entitled to pursue discovery of matters not addressed by class counsel.

In this same connection it should be pointed out that even if the class action is not decertified, but proceeds and is resolved either by trial or settlement, Plaintiffs' Liaison Committee will be entitled to conduct discovery in order to prove the issue of "aggravating circumstances" in the wrongful death cases.

Justice for these people is their perception of justice and what happens to them and their case. There is no substitute for having their own lawyer in whom they have reposed their confidence and trust.

Defendants answer all these points by asserting the burden and expense on them if depositions and discovery are allowed to proceed in the State cases. They argue that the duplication of discovery would be oppressive.

The alternative of re-doing all or part of the depositions a year or so hence suggests a far greater burden on everyone.

Plaintiffs' Liaison Committee argues that, "aggravating circumstances" which is a permissible element of damages in wrongful death cases are given in a single award and are unlike punitive damages. *Glick v Ballentine Produce, Inc.*, 396 S.W. 2d, 609 (1965) *Appeal Dismissed*, 385 U. S. 5, (1966). They say therefore that this issue is not being pursued in the Federal class action and further that defendants Hyatt, Eldridge Construction Co., Havens Steel and PBNDML, in their briefs filed before the Eighth Circuit argued that wrongful death actions cannot be included in a punitive damage class.

Plaintiffs state, therefore, that they are entitled under Missouri Rules of Civil Procedure to conduct discovery on their claims. They point out that although the class action is pending in the Federal District Court, Judge Wright has entered no order to stay these proceedings or to enjoin the plaintiffs from going forward with the desired discovery. They claim that the Federal Anti-Injunction Act, 28 U. S. C. §2283 specifically prohibits the Federal Courts from enjoining State proceedings except in certain inapplicable exceptions.

Plaintiffs seek to frame this particular issue for appeal. Both sides of the controversy have advised the Court they intend to appeal. The question of how to treat the wrongful death claimants in the class action if it is allowed to continue is one which the Federal Courts

must determine on the basis of the applicable law of the State of Missouri. These issues should be addressed and decided by the Missouri Courts. This is particularly true in an extraordinary circumstance such as is presented by this disaster. These issues, hopefully, may be addressed by the Missouri Court of Appeals through the vehicle of the rulings on the current motion. Then there will be no need for the Federal Courts to speculate as to what the rule of law is in Missouri under the circumstances of these many cases.

Ever since the ruling in *Erie Railroad v Tompkins*, 304 U. S. 64, 48 S. Ct. 817, "the laws of the States, whether they be those enacted by the State Legislature or as declared by its highest court, control in the Federal Courts." 20 Am. Jur. 2d Courts §207. In all cases where the Federal Court is exercising jurisdiction solely because of the diversity of the citizenship of the parties, the outcome of the litigation in the Federal Court should be substantially the same as it would be if tried in a State Court. *Id.* §209.

This Court cannot close the door to those litigants who have filed in the State Court and order that they sit on the sidelines of this litigation any longer. The Court feels that in all fairness and justice they should be allowed to participate in discovery and pursue their cases.

Courts are reluctant to interfere with the jurisdiction of another court. The question is one of great delicacy and leads to a conflict of jurisdiction. The Federal and State Courts act independently within their spheres. This ruling causes no such conflict. Rather, it results in the State Court proceeding concurrently—coordinately with the Federal Court.

"Where the judgment sought is strictly in personam both a State and a Federal Court, having jurisdiction may

proceed with the litigation;" "priority" and "comity" are not an issue in these cases. *Id.* §128, §135.

This Court concludes that proceeding with discovery is appropriate and necessary in view of the posture of these cases.

This Court must give effect to plaintiffs' selection of a court. Next to the deep loss suffered by the injured and the survivors of those killed which was equally shared by the community as a whole, the greatest tragedy that could be suffered by these many litigants in this disaster is not in the fact of any injustice in their case, but rather in the feeling of an injustice.

Accordingly, this Court SUSTAINS Plaintiffs' Liaison Committee's Motion to Proceed With Discovery in the Wrongful Death Actions. Of course, any depositions taken in those actions may be used in all actions pending to avoid duplication of effort. At Plaintiffs' Liaison Committee's request, this order is limited to the wrongful death actions so that the several issues that these actions raise may be considered on appeal of this order. This consideration would be particularly helpful to guide the trial court in the future handling of these many actions.

It follows that defendants PBNDML, Gillum-Colaco, Havens Steel, Agcrete, Inc., Smith & Boucher, Inc., Motions to Stay Proceedings are all OVERRULED.

The Court directs that Plaintiffs' Liaison Committee and Defendants' Liaison Committee meet and confer on the subject of how to proceed with the ordered discovery and report their suggestions to the Court on or before June 11, 1982. Of course they should endeavor to see if some agreement may be reached in this regard with Class Action attorneys. Some accommodation would have to be reached in this regard if the two classes were decertified

on appeal now or at a later time. That accommodation should be made now. This Court expects that discovery will proceed in an orderly manner and in good judgment with all of the interests of all parties considered.

The Court will on June 7, 1982 enter this order unless prohibited by the Missouri Court of Appeals, Western District of the Supreme Court of Missouri. This will give defendants an opportunity for "appeal" and review of this order.

/s/ Timothy D. O'Leary
Judge Timothy D. O'Leary

DATE: June 3, 1982

Copies mailed to:

Patrick McLarney, Plaintiffs' Liaison Committee

Thomas Leittem, Defendants' Liaison Committee

for distribution to all other parties.

Missouri Court of Appeals, Western District,
The Honorable Harold L. Lowenstein

GLADYS TYREE, Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

IN RE FEDERAL SKYWALK CASES)
)
)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION IN LIMINE

INTRODUCTION

In its Order and Memorandum of January 25, 1982, certifying a class under Rule 23(b)(1), this Court established two simple and fundamental ground rules for individual settlements between defendants and members of the class. The first rule is that defendants and members of the class can settle claims for compensatory damages on an individual basis. The second and equally important rule is that claims for punitive damages cannot be settled on an individual basis. (Order, pp. 12, 17.)

As the Court noted, permitting individual settlements of compensatory damage claims will enable victims who choose to do so to "negotiate and execute settlement agreements with those defendants who have vociferously urged this Court to allow the settlement process to continue." (Order, p. 17.) At the same time, barring settlements of punitive damage claims is absolutely essential to "protect the interest of every victim in receiving his or her just share of any punitive damage award." (Order, p. 12.) An equitable division of punitive damages can be achieved

"[o]*nly by a single class-wide adjudication of punitive damages* . . . ." *Id.* (Emphasis supplied.)

Despite the clear language of the Order and Memorandum certifying the class, certain defendants have recently given notice that they intend to obtain individual settlements not only of claims for compensatory damages but also of claims for punitive damages. Defendants Crown Center Redevelopment Corporation, Hallmark Cards, Inc., and Hyatt Corporation (hereinafter "defendants") plan to settle "claims for compensatory damages, *but will only settle such claims in return for a full release of all claims, including a waiver of any claim for punitive damages.*" Notice, Feb. 2, 1982, at 1 (emphasis supplied). Defendants plan to pay a single, undivided sum in return for the release of a victim's claims for both compensatory and punitive damages. At the class trial on punitive damages, defendants plan to use these settlements in an attempt to defeat or diminish the recovery of punitive damages by the class.

The defendants' scheme would thwart the very purpose of a Rule 23(b)(1)(B) class action on punitive damages and circumvent this Court's ruling that claims for punitive damages cannot be settled on an individual basis. To prevent the defendants' attempted end-run around the (b)(1)(B) class action certified by this Court, plaintiffs move for an order *in limine* prohibiting the defendants from using individual settlements to defeat or in any way impair the "single class-wide adjudication . . . of punitive damages" on behalf of all victims of the disaster. (Order, p. 12.)

I. PUNITIVE DAMAGE CLAIMS CANNOT BE SETTLED INDIVIDUALLY.

A. This Court's Order and Memorandum of January 25, 1982, Prohibits Individual Settlements of Punitive Damage Claims.

The short answer to the defendants' Notice is that this Court's Order and Memorandum certifying the class forbids individual settlements of claims for punitive damages. While the Court concluded that individual settlements of claims for compensatory damages are permissible, the Court expressly held that "claimants who want to exact payment for allegedly punishable acts must forego the settlement process and *await the trial of the punitive damage issues.*" (Order, p. 17; emphasis supplied.) As the Court emphasized, settlements of punitive damage claims must be prohibited for one simple and compelling reason:

> Only a single class-wide adjudication of the issues of liability for and amount of punitive damages can protest the interest of every victim in receiving his or her just share of any punitive damage award.

(P. 12.) The issues decided on January 25th including the effect of certification on individual settlements, were thoroughly briefed by all parties over a lengthy period. Plaintiffs explicitly stated that protection of the class's right to a full punitive damage award would require a prohibition of individual punitive damage settlements:

> A settling defendant must not be permitted to argue in the class-wide trial of punitive damages that it has already been punished because a portion of the settlement proceeds were paid in return for the release of the settling plaintiff's claim for punitive damages.

Plaintiffs' Second Supplemental Memorandum in Support of Motion for Class Certification, December 18, 1981, at 26-27. Of the numerous briefs filed by the defendants, not one took issue with plaintiffs' statement that the objective of a (b)(1)(B) class action would be thwarted if individual settlements could be used to reduce or eliminate the recovery of punitive damages by the class. After full briefing and argument of the issues, the Court handed down its rulings. The case should now proceed on the basis of those rulings.

Although the defendants have never moved for reconsideration of the Order and Memorandum certifying the class, they have now given notice that they plan to ignore the Court's ruling that claims for punitive damages cannot be settled individually but must be determined *solely* on a class-wide basis. The defendants plan to negotiate individual settlements "of all claims, including . . . any claim for punitive damages." Notice at 1. The defendants' settlement plans are not only contrary to this Court's Order and Memorandum of January 25, 1982; they are also contrary to the very purpose of a Rule 23(b)(1)(B) class action on puntiive damages and contrary to Missouri's rule prohibiting the use of insurance coverage to pay punitive damages.

B. The Defendants' Plan Flies in the Face of the Whole Purpose of a Rule 23(b)(1)(B) Class Action on Punitive Damages.

It is important to understand just what the defendants now propose to do. The defendants have made it clear that they plan to make essentially the following offer to individual victims:

> We will give you a sum of money if—and only if—you agree to release both your claim for compen-

> satory damages and your claim for punitive damages. If you won't agree to release your punitive claim, we won't even consider a settlement. Take it or leave it.

This, the defendants hope, will be an offer that some victims cannot refuse.

Then, at the class-wide trial on punitive damages, the defendants plan to introduce such settlements and argue to the jury, in substance:

> We've already been punished. We've settled the following punitive damage claims: [reciting the specifics of the cases settled.] We've already been punished. We shouldn't receive still more punishment.

The defendants' scheme would frustrate the whole purpose of certifying a (b)(1)(B) class action on punitive damages. The very reason for trying punitive damages in a (b)(1)(B) class action is to avoid successive awards of punitive damages that would allow the defendants to cry, in each case after the first, "We've already been punished." As this Court has recognized, successive awards of punitive damages would "permit the sacrifice of one aggrieved party's claim for the sole benefit of another aggrieved party." (Order, p. 11.) Victims not first in line would inevitably be prejudiced, because their punitive recoveries would either be reduced or even at some point perhaps eliminated altogether. Given the inequity that would result from a series of punitive damage determinations, "[o]nly a single class-wide adjudication of . . . punitive damages can protect the interest of every victim in receiving his or her just share of any punitive damage award." (Order, p. 12.)

The *"Dalkon Shield"* decision rested on precisely the same rationale:

> Without a Rule 23(b)(1)(B) class action, . . . [t]here is no basis for priority to punitive damages among the claimants, or for awarding such damages to one or more and not to others. . . . [T]he class action is the best available device to protect the interests of all parties.

In re "Dalkon Shield" Litigation, C80-2213 SW (Nov. 5, 1981), at 16.[1]

It would be completely inconsistent with the purpose of a (b)(1)(B) class action to allow the defendants to obtain individual settlements of punitive damage claims and then use such settlements to defeat or diminish the recovery by the rest of the class. The interest of nonsettling members of the class in obtaining punitive damages would be prejudiced *for no reason other than their decision to try their punitive damage claims rather than negotiate quick settlements.* Such an outcome would be grossly unfair. A victim's decision to settle his claim affords no basis whatsoever for impairing the interest of others in obtaining punitive damages. It was precisely in order to avoid such unfairness to victims who are not first in line that a (b)(1)(B) class action was certified. Having certified that class action, this Court should not permit it to be gutted by the defendants' settlement strategy.

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1. *See also Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 and n.11 (2d Cir. 1967) ("[w]e have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions . . . can be . . . administered," but "[i]f there were any way in which all cases could be assembled before a single court, . . . it might be possible for a jury to make one award to be held for appropriate distribution among all successful plaintiffs"); 4 *Restatement of Torts* 2d § 908, Comment e (1977) ("In a class action involving all claims, full assessment of the punitive damages can be made.").

C. Missouri Law Forbids the Payment of Punitive Damages by Insurers.

The public policy of Missouri forbids the use of insurance proceeds to pay punitive damages. The settlement sought by the defendants would violate that fundamental public policy. For that reason alone, the defendants' scheme is impermissible and improper.

The controlling case is *Crull v. Gleb*, 382 S.W.2d 17 (Mo. App. 1964). The court held that public policy requires that "the burden of paying punitive damages should rest ultimately, as well as nominally, on *the party who actually committed the wrong.*" *Id.* at 23 (emphasis supplied). If a wrongdoer could shift the burden of a punitive damage award to his insurer, "the award would have served no purpose. Plaintiff would have already been made whole through his compensatory damages, and the insurance company, which had done no wrong, would be punished." *Id.*

As stated in *Crull*, "[t]he chief purpose of punitive damages is punishment to the offender. . . ." *Id. See also, e.g., State ex rel. Joseph Belt R. Co. v. Shain*, 108 S.W.2d 351, 356 (Mo. 1937). Allowing insurance against punitive damages would defeat this purpose. "In order for the theory of punitive damages . . . to work, the [wrongdoer] must not be able to transfer his responsibility for punitive damages to others." *Crull v. Gleb*, 382 S.W.2d at 23. Just as insurance against criminal fines is contrary to public policy, public policy "invalidate[s] any insurance contract against [the] civil punishment that punitive damages represent." *Id.* The defendants have made it clear that it is their insurers, not they, who are bearing the cost of settlements. This Court should not allow the defendants to avoid or diminish their responsibility for punitive damages through insurance payments.

II. EVEN IF INDIVIDUAL PUNITIVE DAMAGE SETTLEMENTS WERE PERMISSIBLE, THEY COULD NOT BE USED TO DEFEAT OR DIMINISH THE RECOVERY OF PUNITIVE DAMAGES BY THE CLASS.

Even assuming for the sake of argument that the defendants could properly negotiate individual settlements covering claims for punitive damages, it would be absolutely improper for the defendants to use such settlements to defeat or diminish the recovery of punitive damages by the class. No court has ever allowed a defendant to introduce a prior punitive damage *settlement* in a trial on punitive damages.

Some courts have not even allowed prior punitive damage *verdicts* to be introduced into evidence. *See, e.g., Ostpowitz v. Wm. S. Merrell Co.*, (S. Ct., Westchester Cty., N.Y., Jan. 4, 1967), *cited in Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 834 n.3 and 839 n.9 (2d Cir. 1967). It appears that the Missouri courts may adopt this view. *See Monsanto Co. v. Parker*, No. CV3-80-144CC (C. Ct. Montgomery Cty., Jan. 6, 1981), at 2 (concluding that there is "nothing in Missouri statutory or case law" to indicate that a plaintiff's right to seek punitive damages can be "restricted by the fact that others have, or may in the future, present a similar claim arising out of the same wrongful act of a defendant"), *appeal pending*, No. 43829 (Mo. Ct. App., E.D.).[2]

The furthest that any court has gone is to permit juries to consider prior and potential future punitive damage

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2. It is unlikely that the court of appeals will rule on the merits of this issue in the *Monsanto* case, since there is no basis at all for Monsanto's contention that Missouri law allows only one award of punitive damages for a single act. Since this contention is completely without support in the law of either Missouri or any other state, the court of appeals will likely affirm the trial court's decision that an interpleader action, which presupposes a unitary liability, is unavailable to Monsanto.

verdicts. See State ex. rel. Young v. Crookham, 618 P.2d 1268, 1272-73 (Or. 1980); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 459-60 (Wis. 1980). This is the approach suggested by the *Restatement of Torts 2d* where multiple claims arising from a single wrong are tried in individual actions rather than in a class action. 4 *Restatement of Torts 2d* § 908, Comment e (1977).

No court has ever allowed a defendant to introduce a *settlement* of a punitive damage claim. Even the courts that have gone the farthest to protect defendants have limited the jury's consideration to other *verdicts*. *See, e.g., State ex rel. Young v. Crookham*, 618 P.2d at 1273 (allowing consideration of " 'punitive damages that have been awarded in prior suits and those that may be awarded in the future' ") (*quoting Restatement of Torts 2d*, § 908, Comment e); *Wangen v. Ford Motor Co.*, 294 N.W. 2d at 460 ("punitive damages . . . already imposed on the defendant or likely to be imposed"). *See also* Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1319 (1976) ("punitive damages awarded to other plaintiffs").

In short, the most that defendants have received is some protection from *multiple* punishment, protection in the form of jury consideration of other verdicts. The courts have uniformly rejected the notion that a defendant can be punished only once for a single wrong. There is "no principle whereby the first punitive award exhausts all claims for punitive damages and would thus preclude future judgments. . . ." *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d at 839 (footnote omitted). *Accord, State ex rel. Young v. Crookham*, 618 P.2d at 1271-72; *Wangen v. Ford Motor Co.*, 294 N.W. 2d at 459-60.

In this case, however, the defendants have received additional protection far beyond the protection afforded by

the law of punitive damages—they have been assured that they will be punished *only once* for any wrongdoing. The (b)(1)(B) class action on punitive damages removes any possibility of multiple punishment.

And yet the defendants still are not satisfied. They are not satisfied with being assured of only a single day of reckoning. They want that day to be only a partial reckoning. They want to say to the jury, "Don't punish us for the deaths of more than 100 people. We've settled 50 of those cases." They want to say to the jury, "Don't regard this as a case of 200-odd serious injuries. We've settled with 100 of those victims."

The defendants should not be allowed to escape full responsibility for their wrongdoing. The certification of a (b)(1)(B) class action ensures that they will not be punished more than once for their misconduct. But neither should they escape without one, full, complete, and total evaluation of their conduct and the appropriate punishment for that conduct. "In a class action involving all claims, *full assessment* of the punitive damages can be made." *Restatement of Torts 2d* § 908, Comment e (emphasis supplied). The defendants should not be permitted to prevent the Kansas City community, as represented by the jury, from expressing its full moral condemnation of their conduct by returning an award of punitive damages calculated to punish them for *all*—not just some—of the terrible consequences of the collapse of the skywalks on July 17, 1981.

The defendants' proposed use of individual settlements is also precluded by Rule 408 of the Federal Rules of Evidence, which forbids proof of settlements and settlement offers. Rule 408 excludes evidence of "a completed compromise of a claim arising out of the same transaction between a third person and a party to the suit being litigated." 2 *Weinstein's Evidence* ¶408[04] at 408-23 (1981) (footnote omitted). A plaintiff cannot use a settlement

between the defendant and the third party to support his own claim,[3] and neither can a defendant use such a settlement in support of his defense.[4] "Rule 408 codifies the general practices of the federal courts in making compromise agreements inadmissible in such circumstances as proof of liability for, or invalidity of, the claim or its amount." 2 *Weinstein's Evidence* at 408-23 to 408-24 (footnotes omitted).

III. IF EVIDENCE OF THE STATEMENTS IS TO BE ADMITTED, THE JURY SHOULD BE INSTRUCTED THAT NO PORTION OF THE SETTLEMENT PAYMENTS IS ALLOCABLE TO PUNITIVE DAMAGES.

If evidence of the settlements is to be admitted, the jury should be instructed that, as a matter of law, all of the settlement proceeds are allocable to the settling victims' claims for compensatory damages and none are allocable to their claims for punitive damages. Under the Missouri rule prohibiting insurance for punitive damages, none of the settlements entered into by the defendants' insurers can include payment of punitive damages. Although the jury need not be informed of the reason that none of the settlements can cover punitive damages, it clearly should be told that they cannot. Otherwise, the jury would be erroneously led to believe, from the language of the settlements, that the defendants truly have made payments to the settling victims for the release of their punitive damage claims.

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3. *See, e.g., Matter of Sun Oil Co. v. Govostes*, 474 F.2d 1048, 1049 (2d Cir. 1973) (*per curiam*); *Jackson v. Shell Oil Co.*, 401 F.2d 639, 643 (6th Cir. 1968); *Bratt v. Western Air Lines, Inc.*, 169 F.2d 214, 217 (10th Cir.), *cert. denied*, 335 U.S. 886 (1948).

4. *See, e.g., Insurance Co. v. Weides*, 81 U.S. 375, 381 (1871); *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, 486 F. Supp. 414, 423 & n. 10 (S.D.N.Y. 1980); *Meek v. Miller*, 1 F.R.D. 162, 163 (M.D. Pa. 19040).

IV. AT THE VERY LEAST, PLAINTIFFS MUST BE PERMITTED TO GO BEHIND THE BARE LANGUAGE OF THE SETTLEMENTS AND SHOW THAT NOTHING WAS PAID FOR THE RELEASE OF PUNITIVE CLAIMS.

If evidence of settlements is to be received, plaintiffs request that, at the very least, they be permitted to go behind the releases and present evidence showing that the settlements do not in fact include any payments for the settling victims' claims for punitive damages. This evidence would include proof of any clauses in the defendants' insurance policies excluding coverage of punitive damages.[5] Similarly, plaintiffs should be able to bring to the jury's attention the Missouri rule against payment of punitive damages by insurers. In short, plaintiffs should be permitted to put the whole picture before the jurors, so that they are not misled by the boilerplate recitals in the settlements themselves.

V. INDIVIDUAL SETTLEMENTS OF COMPENSATORY CLAIMS WILL BE IRRELEVANT IN THE CLASS-WIDE TRIAL ON PUNITIVE DAMAGES.

It almost goes without saying that individual settlements of compensatory claims will be irrelevant in the classwide trial on punitive damages. The issue at that time will be how much the defendants should be *punished* for

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5. Rule 411 of the Federal Rules of Evidence would present no obstacle to such proof. While Rule 411 provides that evidence of insurance or the lack of insurance "is not admissible upon the issue whether [the defendant] acted negligently or otherwise wrongfully," it expressly permits introduction of such evidence "when offered for another purpose . . . ." Here clauses excluding coverage of punitive damages would be offered to rebut the defendants' contention that individual settlements somehow constitute prior punishment for the defendants' conduct. Once the defendants have opened the door by introducing the settlements, they can scarcely be heard to object to rebuttal evidence showing what the settlements actually represent.

their wrongdoing, not how much they should be required to pay in *compensation*. Since the issue will be punishment and not compensation, individual settlements of compensatory claims will be completely irrelevant.[6]

VI. THE DEFENDANTS CANNOT HOLD THIS COURT'S DESIRE TO ALLOW SETTLEMENTS HOSTAGE.

The defendants have indicated that if settlements cannot be obtained on their terms—including a release of both compensatory and punitive claims—they will not settle at all. *See* Notice at 1 ("defendants . . . . will *only* settle . . . . in return for a full release of all claims") (emphasis supplied). This threat constitutes an improper attempt to take advantage of this Court's justifiable desire to permit victims to settle their compensatory claims if they choose to do so. The defendants are presenting this Court with a false set of alternatives: allow settlements on our terms, or there will be no settlements at all.

There is absolutely no reason to believe settlements will stop if this Court simply reaffirms its ruling that they must be limited to compensatory damages. Common sense indicates that settlements will continue if the defendants are willing to negotiate in good faith. As is true in any mass disaster, some victims will be willing to accept settlements of their compensatory claims for far less than they might be able to obtain at trial, so that they can

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6. The defendants may plan to argue that their willingness to enter into individual settlements shows that their conduct has not really been malicious, reckless, or wanton. But the defendants' conduct *after* the disaster has no bearing whatsoever on whether their conduct *prior* to the disaster was malicious, reckless, or wanton. Only the conduct that caused the disaster is relevant to the award of punitive damages. If the settlements have any relevance at all, the proper occasion for considering them would be on a motion for remittitur. Even then, plaintiffs would take the position that the settlements have no bearing on whether the jury's award is excessive.

eliminate any uncertainty and receive their money now. For such victims, the defendants would be foolish not to attempt to reach a settlement. For example, any defendant would settle a paraplegic's compensatory damage claim to avoid the very real prospect of a jury award many times greater than the amount of the settlement. It would be completely illogical for a defendant to bypass such a settlement simply because the paraplegic's claim for punitive damages would remain intact. Whatever the defendants are now saying, this Court can be fully confident that they will recognize when settlements are in their economic interest and that they will act accordingly.

Refusal to accede to the defendants' ultimatum thus should not prevent legitimate settlements. Only the defendants' selfish desire to punish the plaintiffs and this Court for the class certification can stop settlements. Moreover, as this Court recognized at the December 10th certification hearing when confronted with plaintiff-intervenors' claim that class certification would put an end to the settlement process, the one thing that will do more to facilitate settlements than anything else is a speedy trial of the class-wide issues. Once those issues are resolved, settlements can be expected to follow in rapid succession. *See* Transcript of December 10, 1981, Hearing at 74 (after class-wide trial is completed, victims "could go ahead and settle all they wanted to"). The efforts of all concerned should be directed to ensuring an expeditious trial, not to revising the ground rules for settlements and undercutting the purpose of a (b)(1)(B) class action on punitive damages.[7]

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7. Another troubling consequence of defendants' scheme is its unfairness (perhaps intended) to counsel for the class. The proceedings between now and mid-August may well put it beyond

(Continued on following page)

CONCLUSION

The type of settlement the defendants plan to obtain would include releases of claims for both compensatory damages and punitive damages. Neither release would be admissible in the class-wide trial on punitive damages.

The release of a victim's punitive damage claim would be inadmissible for two reasons. First, claims for punitive damages simply cannot be settled on an individual basis. Such settlements would be contrary to this Court's Order and Memorandum certifying the class, contrary to the purposes of a (b)(1)(B) class action on punitive damages, and contrary to the Missouri rule prohibiting insurance for punitive damages. Second, even assuming that punitive damage claims could be settled on an individual basis, those settlements would be irrelevant in the class-

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Footnote continued—

doubt that the day of trial will, for one or more defendants, be a day of reckoning indeed. Defendants therefore may raise the level of their offers in order to accelerate the pace of settlement, hoping that by August 16 something close to 100% of the class settles. Assume that defendants succeed and that as of August 16, every claim has been settled save that of Shirley Stover, the class representative. If defendants have their way, the verdict in Mrs. Stover's trial for punitive damages will be adversely affected by the settlements with all other class members. The jury's verdict after the evidence of settlement is presented, will be, let us say, $1 million, and the verdict the jury would have rendered had there been no settlements, $500 million. Many of the settlements, in fact, most, if not all, of those occurring shortly prior to trial, will have been made possible by the skill and energy of counsel for the class in prosecuting an action that induced the defendants to agree to settlements. Yet, these efforts will have also brought about a diminution of the fund secured for the non-settling class members. How then is counsel's compensation to be determined? And who is to pay it? The settling class members or those who go to trial? Or both? And in what proportion? If the recoveries generated, in whole or part, by class counsel, are deemed to be anything more than the jury verdict, what is the source of the money to pay whatever the Court allows counsel for the class? We do not now have answers. We merely identify the questions to emphasize the imprudence of defendants' proposal.

wide trial on punitive damages. There is no authority whatsoever for introducing prior settlements in the very first trial on punitive damages. A settlement in no way constitutes a determination of the appropriate punishment for a defendant's wrongdoing. Furthermore, proof of settlements is barred by Rule 408 of the Federal Rules of Evidence.

The release of a victim's claim for compensatory damages would be inadmissible for the simple reason that it is irrelevant to the determination of how much the defendants should pay in punitive damages.

For the foregoing reasons, this Court should enter an order *in limine* barring the defendants from using individual settlements to defeat or diminish the recovery of punitive damages by the class.

Respectfully submitted,

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February 10, 1982

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I hereby certify that a copy of the foregoing Plaintiffs' Motion In Limine with Memorandum in Support thereof were mailed, postage prepaid, this 10th day of February, 1982, to:

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Office-Supreme Court, U.S.
FILED
OCT 6, 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SHIRLEY STOVER, *et al.*,
Petitioners,

v.

MELANIE HANSON JOHNSON,
GERARD STANLEY JOHNSON, *et al.*, and
JACQUELINE N. RAU,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS CROWN CENTER REDEVELOPMENT CORPORATION AND HALLMARK CARDS, INCORPORATED IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an order certifying a class action under Fed. R. Civ. P. 23(b)(1) that prohibits class members from entering into comprehensive individual settlements of their pending personal injury and wrongful death actions is an injunction appealable under 28 U.S.C. § 1292(a)(1).

2. Whether a federal court order certifying a mandatory class action under Rule 23(b)(1) and prohibiting the individual settlement of actions previously initiated in state court by individual class members violates the Anti-Injunction Act, 28 U.S.C. § 2283.*

---

* Although respondents oppose the petition in this case, they are filing a conditional cross-petition that would present related questions.

LIST OF PARTIES

Parties to the proceedings in the United States Court of Appeals for the Eighth Circuit, Nos. 82-1181 and 82-1207 (consolidated), were: Shirley Stover, a representative of the federal plaintiff class; the Honorable Scott O. Wright, United States District Judge for the Western District of Missouri; Jacqueline N. Rau; Melanie Hanson Johnson and Gerard Stanley Johnson, representing those members of the class who have individual actions pending in the Missouri state courts; Crown Center Redevelopment Corporation; Hallmark Cards, Incorporated; Hyatt Corporation; Eldridge & Son Construction Co., Inc.; Gillum-Colaco Consulting Structural Engineers, Inc.; Havens Steel Co.; PBNDML Architects Planners, Inc.; and Smith & Boucher, Inc.*

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* Crown Center Redevelopment Corporation and Hallmark Cards, Incorporated participated in the proceedings in the Eighth Circuit as respondents, not as *amici curiae*. *See* p.1 n.1, *infra*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-217

SHIRLEY STÖVER, *et al.*,

Petitioners,

v.

MELANIE HANSON JOHNSON, GERARD STANLEY JOHNSON, *et al.*, and JACQUELINE N. RAU,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS CROWN CENTER REDEVELOPMENT CORPORATION AND HALLMARK CARDS, INCORPORATED IN OPPOSITION

Respondents Crown Center Redevelopment Corporation ("Crown Center") and Hallmark Cards, Incorporated ("Hallmark")[1] oppose the granting of the

[1] Both petitioner and the court of appeals inaccurately refer to Crown Center and Hallmark as *amici curiae*. Crown Center and Hallmark participated actively as respondents in the proceedings in the court below. *See* Fed. R. App. P. 21(b). Under Rule 19.6 of this Court, Crown Center and Hallmark are also respondents in this Court and thus are parties to this proceeding.

(footnote continues)

petition for a writ of certiorari filed by Shirley Stover to review an interlocutory decision of the United States Court of Appeals for the Eighth Circuit.[2]

STATEMENT

Petitioner seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit vacating the certification of a class action under Fed. R. Civ. P. 23(b)(1) by the United States District Court for the Western District of Missouri. The Eighth Circuit held that the district court's class action order, which expressly prohibited the comprehensive settlement of numerous actions previously filed by class members in state court, violated the Anti-Injunction Act's prohibition against federal court orders enjoining state court proceedings.

The Eighth Circuit's decision does not merit review by this Court since it is not in conflict with the decision of any other court of appeals and does not conflict with any decision of this Court. The decision, which is consistent in its result with a recent decision of the Ninth Circuit

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(footnote continued)

Pursuant to Rule 28.1 of this Court, respondents state that Crown Center is a wholly-owned subsidiary of Hallmark, with no subsidiaries or affiliates except wholly-owned subsidiaries, and that Hallmark is a privately-held corporation with no parent company. Hallmark's only subsidiary, other than wholly-owned subsidiaries, is Grupo H. d M, S.A. de C.V., a Mexican company.

[2] Counsel for the following defendants in the various state and federal skywalk cases have asked that we inform the Court that their clients join in the views set forth in this brief in opposition: Concordia Project Management Ltd.; Eldridge & Son Construction Co., Inc.; General Testing Laboratories, Inc.; Gillum-Colaco Consulting Structural Engineers, Inc.; Havens Steel Co.; H&R Inspection Service, Inc.; Hyatt Corp.; Marshall & Brown, Incorporated; Midwest Mechanical Contractors, Inc.; National Fire Sprinkler Corp.; PBNDML Architects Planners, Inc.; and Seiden & Page, Inc.

vacating a similar Rule 23(b)(1) class action,[3] is based on the Eighth Circuit's interpretation of the unusual certification order entered by the district court. The fact-specific nature of the court of appeals' ruling renders further review inappropriate. Review should also be denied since it would unnecessarily delay the disposition, either by settlement or by trial, of the claims asserted by the victims of the collapse.

1. The collapse of two skywalks at the Hyatt Regency Hotel in Kansas City on July 17, 1981 was followed by the filing of numerous personal injury and wrongful death actions. Of the approximately 150 cases brought within six months of the collapse, all but 18 were filed in the Circuit Court of Jackson County, Missouri. The few cases not brought in Missouri state court were filed in the United States District Court for the Western District of Missouri. The flood of lawsuits generated by the collapse initially proceeded expeditiously, with individual cases consolidated for pretrial discovery which was coordinated in the state and federal courts. Prior to the federal court's certification of a class action in January 1982, more than 120 bodily injury and wrongful death claims had been settled through the payment of more than $18 million to compensate victims and their families. *See* Affidavit of Michael E. Waldeck, dated March 4, 1982 (Supplemental Appendix in Nos. 82-1181 and 82-1207 (consolidated) (8th Cir.), Exhibit 50).

2. In October 1981, after numerous individual state and federal court cases had been filed, a single plaintiff, Molly Riley, moved in federal district court for certification of a class action. One hundred seventy-five potential class members with claims arising from the accident filed

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[3] *In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*, Nos. 81-4648 through 81-4656 (9th Cir. June 18, 1982, as amended, July 15, 1982).

affidavits in opposition to the class certification motion. *See* Supplemental Appendix in Nos. 82-1181 and 82-1207 (consolidated) (8th Cir.), Exhibit 73.

On January 25, 1982, the federal court certified a mandatory class action under Rule 23(b)(1). The court certified a class action under Rule 23(b)(1)(A) on the issues of liability for compensatory and punitive damages and under Rule 23(b)(1)(B) on the issues of liability for, and amount of, punitive damages. Pet. App. 50a-55a. The procedures followed by the district court in certifying the class action were unorthodox and improper.[4]

While the district court stated that settlements of "actual damages" could continue, it prohibited class members from settling their punitive damage claims. *See* Pet. App. 9a. The court stated that "claimants who want to exact payment for allegedly punishable acts must forego the settlement process and await the trial of the punitive damage issues." Pet. App. 60a. The practical effect of the district court's order was to prohibit settlement of any claims, because parties to litigation compromise and settle claims to obtain "a final determination of the controversy

[4] The federal court denied plaintiff Riley's motion for class certification on the ground that she had "failed to join certain parties who are needed for a just adjudication." Pet. App. 42a, 61a. After rejecting as a class representative the only plaintiff who had sought class action treatment, the district judge took the extraordinary step of commencing his own "search of court records in order to determine which federal court plaintiffs could serve as representatives of the class." Pet. App. 43a. Without prior notice to the parties or an opportunity for them to address the critical question of adequacy of representation, the court *sua sponte* certified a class action and named four plaintiffs, including Mrs. Stover, as class representatives. Pet. App. 43a, 61a. Soon after the court issued its class certification order, it was discovered that two of the named plaintiffs selected by the federal judge lacked the necessary diversity of citizenship and that a third had already settled his claim. Petitioner Stover thus remained as the only representative of the plaintiff class.

between them." *Restatement of Restitution*, § 11, Comment c (1937). Predictably, the settlement process was halted by the district court's order and no additional claims were settled until the class certification was vacated by the Eighth Circuit.

3. The district court refused to certify its class action order for interlocutory appeal under 28 U.S.C. § 1292(b). Therefore, both a petition for mandamus and an appeal under 28 U.S.C. § 1292(a)(1) were filed by individual members of the class who objected to the certification. The court of appeals consolidated these cases and, on June 7, 1982, vacated the class certification order.

The Eighth Circuit found that, "contrary to the class's assertion, the district court expressly prohibited class members from settling their punitive damage claims." Pet. App. 9a. As a result, the court of appeals concluded "on the facts before us" that the "substantial effect of the order" was injunctive in character and that the order therefore was appealable under 28 U.S.C. § 1292(a)(1). Pet. App. 8a-9a. The Eighth Circuit held that the class certification order violated the Anti-Injunction Act, 28 U.S.C. § 2283, because the order prevented the settlement and prosecution of a large number of actions pending in state court that had been filed by individual class members. It held that the only exception to the Act invoked by the class—the exception for injunctions necessary in aid of the federal court's jurisdiction—did not apply on the facts of this case. Pet. App. 12a-15a. In vacating the class certification order, the majority rested exclusively on the Anti-Injunction Act and did not address the propriety of the district court's certification of a mandatory class action under Rule 23(b)(1).

Judge Heaney, in his dissent, agreed that the "district court's class certification order expressly prohibits class members from settling their punitive damage claims" and

thus constituted an "express injunction." Pet. App. 19a n.1; 34a n.16. He departed from the majority in concluding that, if modified to delete the prohibition against settlements, the inherent restrictive effects of the order certifying a mandatory class action would come within the exception to the Anti-Injunction Act for injunctions necessary in aid of the federal court's jurisdiction. Pet. App. 33a-37a & nn.16-17.

4. Since the filing of the petition on August 6, 1982, there have been several important developments in the skywalk cases.

a. On September 17, 1982, the district court rejected petitioner's July 1, 1982, motion to certify a modified Rule 23(b)(1) class action and petitioner's August 30, 1982, motion to certify a Rule 23(b)(3) class action. *See* Appendix A, 5a-6a (the district court's September 17, 1982, order and memorandum is reprinted as Appendix A to this brief). The district judge explained that he was denying these motions in part because he had been advised that petitioner Stover and her children had entered into a settlement of their claims and, as a result, there no longer was a plaintiff with complete diversity as to each of the defendants that was willing to serve as class representative. *Id.*, 6a. The court also declined to certify any type of class action because "few victims have come forward in support" of a class action. *Id.*[5] Instead, the

[5] The petitioner had asked the district court to certify a class action under Rule 23(b)(1), which would include all business invitees present in the hotel lobby at the time of the skywalk collapse who had not yet filed individual suits in state court. The court declined to certify such a modified (b)(1) class action in part because membership in the class would be "governed by the fortuitous circumstance of having rushed to a courthouse to file suit." Appendix A, 5a.

district court ordered the cases pending before it consolidated for trial and set a January 10, 1983, trial date.

b. On September 22, 1982, a Utah resident filed a complaint in United States District Court for the Western District of Missouri asserting claims based on the July 17, 1981, collapse of the skywalks and moved for reconsideration of the district court's September 17, 1982, order denying certification of either a modified Rule 23(b)(1) class action or a Rule 23(b)(3) class action. The district court has not yet ruled on this motion.

c. On September 9, 1982, the numerous skywalk cases pending in the Circuit Court of Jackson County, Missouri, were ordered consolidated for trial on the issues of liability for compensatory and punitive damages. The state court ordered that the consolidated trial will commence on March 14, 1983. This order is reprinted as Appendix B to this brief.

5. In response to a request from respondent Rau, the Court extended the time for the filing of responses to the petition to and including October 7, 1982.

ARGUMENT

1. Petitioner has failed to demonstrate any "special and important reasons" making this case worthy of review by this Court. Supreme Court Rule 17.1. There is no claim that the decision of the Eighth Circuit is in conflict with the decision of any other federal court of appeals on the same issue. To the contrary, both the Eighth Circuit in the decision below and the Ninth Circuit in the recent *Dalkon Shield* case have rejected attempts by district judges to transform mass tort cases into mandatory Rule 23(b)(1) class actions based on the assertion of multiple claims for punitive damages. *See In re Northern District of California, Dalkon Shield IUD Products Liability Litigation,* Nos. 81-4648 through 81-4656 (9th Cir. June 18,

1982, as amended, July 15, 1982). Significantly, the district court decision in this case and the *Dalkon Shield* decision recently reversed by the Ninth Circuit are the only cases in the 16-year history of the modern federal class action rule that have espoused such an extraordinary interpretation of Rule 23(b)(1).

Nor is the decision below "inconsistent with the reasoning" of this Court's decisions in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) and *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978). *See* Pet. 8-9. The Court in the *Coopers & Lybrand* case held that the denial of a request for class certification is not a "final decision" appealable under 28 U.S.C. § 1291. 437 U.S. at 464-65. In *Gardner*, the Court held that the denial of the class certification motion in that case "did not pass on the legal sufficiency of any claims for injunctive relief" and therefore was not appealable under 28 U.S.C. § 1292(a)(1). 437 U.S. at 480-81. Here, by contrast, all three members of the Eighth Circuit panel found that the district court's order certifying a class action constituted an "express injunction" against the settlement of previously filed claims and therefore was appealable under 28 U.S.C. § 1292(a)(1). Pet. App. 34a n.16; *see* Pet. App. 8a-9a. Rather than acting in conflict with decisions of this Court, the Eighth Circuit followed this Court's ruling in *Ettelson v. Metropolitan Life Insurance Co.*, 317 U.S. 188, 192 (1942), that in determining whether an order is an injunction a court should look "to the substantial effect of the order made" rather than "the terminology used." Pet. App. 9a.

2. The fact-specific nature of the Eighth Circuit's Anti-Injunction Act ruling renders it inappropriate for further review by this Court. The Eighth Circuit's decision turns in large part on the panel's assessment of the specific order entered by the district court. The majority repeatedly noted that it disagreed with the "characterization" of the order by the class and stated that its ruling was based

on its assessment of "the facts before us." Pet. App. 8a, 9a, 18a. In particular, the majority focused on the portion of the certification order prohibiting class members from settling their punitive damage claims. Pet. App. 8a-9a. As the dissenting judge recognized, the "majority decision is very narrow." Pet. App. 19a.

3. The interlocutory nature of the Eighth Circuit's decision provides another important reason for denying the petition. This Court has stated on numerous occasions that it "above all others must limit its review of interlocutory orders," *Goldstein v. Cox*, 396 U.S. 471, 478 (1970), and that "except in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). A writ of certiorari should not be issued "to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, Tampa & Key West Railway Co.*, 148 U.S. 372, 384 (1892). No such extraordinary situation is presented here.

4. The decision of the Eighth Circuit also does not merit review since the judgment vacating the district court's certification of a Rule 23(b)(1) class action was clearly correct. Although the Eighth Circuit majority did not reach the question of the propriety of the Rule 23(b)(1) class certification, the district court improperly invoked this type of class action. In these circumstances, review of the particular rationale relied upon by the Eighth Circuit would be an abstract and wholly unnecessary exercise.[6]

---

[6] The impropriety of the district court's certification of a Rule 23(b)(1) class action in these cases is discussed in the conditional cross-petition for a writ of certiorari (pp. 11-15) that is being filed by Crown Center and Hallmark contemporaneously with this brief.

5. There are important practical and policy considerations that support the denial of the petition for a writ of certiorari in this case.

a. Further review by this Court will inevitably delay the resolution of these personal injury and wrongful death cases. As noted previously, prior to the entry of the January 25, 1982, class certification order more than 120 claims had been settled. Settlements resolving approximately 55 additional claims have been entered into since the Eighth Circuit removed the barrier to settlements erected by the district court's order. As this Court has long recognized, "compromises of disputed claims are favored by the courts." *Williams v. First National Bank*, 216 U.S. 582, 595 (1910). Granting the petition is not in the public interest because it would likely again disrupt the process of settlement and compromise of claims.

Moreover, granting of the petition might also delay the trial of cases that are not settled, since the federal and state courts might conclude that they should not proceed with trials until this Court's decision is handed down. Consolidated trials are now scheduled to commence in federal court on January 10, 1983, and in state court on March 14, 1983. Under these circumstances, the normal reluctance of the Court to review interlocutory orders is reinforced by the strong interests of the victims of the collapse in avoiding further delay of the resolution of their claims.

b. Important federalism considerations would also be served by a denial of the petition. Petitioner, through a mandatory federal class action, seeks to require that all the claims arising from the collapse of the skywalks be tried in federal court, despite the fact that all but a handful of the numerous cases brought by claimants have been filed in Missouri state court and that all of the claims are governed

by Missouri law.[7] The decision of the Eighth Circuit has the salutary effect of permitting these cases to proceed in the most appropriate forum and the forum selected by the vast majority of plaintiffs, the Missouri state courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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October 1982.

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[7] At the time the class certification order was entered only 18 of the approximately 150 cases were pending in federal court. At present, only 6 individual cases remain in federal court.

APPENDICES

APPENDIX A

IN THE

United States District Court

FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 81-0945-A-CV-W-5

IN RE FEDERAL SKYWALK CASES

ORDER AND MEMORANDUM

This action concerns the claims that have arisen out of the collapse of two skywalks at the Hyatt Regency Hotel in Kansas City, Missouri on July 17, 1981. On January 25, 1982, this Court certified a mandatory class action under Rule 23(b)(1) for the prosecution of three common issues arising from those claims. *See, In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo. 1982). Those issues included liability for compensatory damages, liability for punitive damages, and amount of punitive damages. The mandatory class action was certified in order to protect the many victims of the Skywalk disaster from the spectre of insufficient funds to pay their damages,[1] to protect the defendants from the burden and

[1] The amount of damages claimed by those victims of the skywalk collapse who have filed suit exceeds 1.5 billion dollars. Though the actual value of those claims is probably less than the amount pled, the actual value clearly exceeds the ability of most defendants to pay. In fact, several defendants have stated in their responses to interrogatories that their net worth is minimal or negative, and insurance carriers contend that their policies with the defendants do not provide coverage for punishable acts. Since it could not be known which defendants, if any, would be held liable for

(footnote continues)

expense of litigating a multiplicity of suits,[2] to guarantee an equitable distribution of punitive damage monies, if

(footnote continued)

the disaster, it became apparent to the Court that the monies available to pay legitimate claims might be limited.

The Court's concern with respect to the ability of defendants to pay compensatory damages was put at ease when it was informed that approximately 150 million dollars had been committed to the settlement of those claims. No money was committed to pay punitive damage claims. In addition, the defendants contended that even if their acts were punishable, only one award of punitive damages was warranted. The Court observed that Missouri law was unclear on the multiple punitive damage award issue. If Missouri law provided for only a single award, then one punitive damage claimant would receive the whole award and would not be required to share it with other claimants. If Missouri law provides for multiple awards, then only the first few award winners could be assured of an award since the fund might be exhausted, the Court might put a limit on total amount recoverable, or each award might be remitted by the amount of previous awards. Under either circumstances, punitive damage claimants would not be treated fairly unless a mandatory class was used. The Court certified the mandatory class in order to provide an equitable result for all claimants.

[2] Approximately 150 suits had been filed in the Circuit Court of Jackson County, Missouri and in this Court. The majority of cases were filed in state court. Approximately 1,000 persons who were business invitees present in the hotel lobby at the time of the skywalks' collapse have not yet filed suit.

Several cases previously filed in this Court were voluntarily dismissed and refiled in state court soon after the appellate court decertified the mandatory class. Those persons who have continued to prosecute their claims in this Court have indicated that they intend to go to trial. Additionally, many cases are pending in state court. Though the parties to the state court action have asserted on many occasions that the parties have agreed to a single trial, no state court order has ever been entered requiring a single trial and no written agreement exists among the parties in state court providing for a single trial. Nor has any order been entered in state court which would prevent those victims who have not yet filed suit from later filing suit and trying their cases. The state court plaintiffs' assertion that there will be only one or very few trials in state court is wholly without support. Even though the defendants vigorously contend that there can only be one award of punitive damages, they have opposed every attempt by this Court to bring that contention to fruition. *See, State ex rel Young v. Crookham*, 618 P.2d 1268 (Ore. 1980) (Tanzer, J., concurring).

any, to all victims without regard to whether a particular victim was first to file and try his or her lawsuit,[3] to insulate those attorneys who represented more than one victim, or representative of a victim, from an actual conflict of interest under Disciplinary Rule 5-105 of the Missouri Code of Professional Conduct,[4] and to provide for an efficient and principled procedural vehicle for the speedy resolution of these cases. *See generally*, Comment, "The Use of Class Actions for Mass Accident Litigation," 23 Loyola L. Rev. 383 (1977); Note, "Mass Accident Class Actions," 60 Cal. L. Rev. 1615 (1972). The individual amount of compensatory damages recoverable by each class member was not to be determined by the class action.

On February 8, 1982, class members Melanie and Gerald Johnson filed a petition for a writ of mandamus in the Court of Appeals for the Eighth Circuit requesting the class action to be set aside and the disqualification of this

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[3] The mandatory class action was certified in order to guarantee that each victim would receive an equitable share of a single punitive damage award if the award was warranted. A victim's share could have been distributed in relation to the amount received for compensatory damage claims. *See e.g., State ex rel Young v. Crockham*, 618 P.2d 1268, 1269 n.2 (Ore. 1980). If multiple trials were conducted, each victim who was not the first to try his or her case might be faced with a culpable defendant whose assets were depleted or with the remittitur of the award based on prior awards.

[4] Disciplinary Rule 5-105 provides, in part, that an attorney must decline or discontinue the representation of multiple clients if the exercise of his independant professional judgment on behalf of the first client who has retained him could be adversely affected by the representation of another client. An attorney places himself in a conflicting position when he undertakes the representation of multiple clients who each have punitive damage claims which have arisen out of a common incident against a common defendant or defendants. The conflict arises because only one of an attorney's clients can be assured that his or her punitive damage award will not be undermined by an award won by another client.

Court.[5] Class member Jacqueline Rau then filed an interlocutory appeal and, in the alternative, a petition for a writ of mandamus. She requested similar relief. The appellate court rendered its decision on June 7, 1982, holding, two-to-one,[6] that the class certification order constituted an injunction appealable as of right under 28 U.S.C. § 1292(a)(1) and was barred by the Anti-Injunction Statute, 28 U.S.C. § 2283. *See In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982). The majority ruled that the Anti-Injunction Act bars any mandatory class action where it is certified after a class member has filed an individual suit in state court. *Id.* at 1180. Though the majority did not question the need for a class action to address the vexing issues facing this Court in this litigation, it vacated the certification order without commenting on alternative means of resolving those vexing issues. *Id.* at 1184 n. 14. The dissent, on the other hand, suggested that this Court either slightly modify its mandatory Class action order or certify an opt-out Class action under Rule 23(b)(3). *Id.* at 1184 (Heaney, J., dissenting). By an equally divided vote, three-to-three,[7] the appellate court denied petitions for rehearing and rehearing *en banc*. The class unsuccessfully petitioned Justice Blackmum [sic] for recall and stay of the Eighth Circuit's mandate pending an application for a writ of certiorari to the Supreme Court. A petition for writ of certiorari is pending. *See, Stover v. Johnson*, No. 82-217 (August 6, 1982).

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[5] The panel unanimously agreed that there was no basis for disqualification. After the mandate of the appellate court became final, the plaintiffs-intervenors and the Hyatt Corporation again moved for disqualification based on many of the same reasons raised before. That motion was denied. In a recent memorandum filed by the Hyatt Corporation, on the issue of the propriety of a Rule 23(b)(3) class action, the Corporation again appears to be asking the Court to disqualify itself. *See*, note 8 *infra*.

[6] Judge Heaney dissented.

[7] Chief Judge Lay, Judge Heaney and Judge Bright voted to grant rehearing *en banc*. Judge John R. Gibson did not participate in the consideration of the petition.

After the mandate of the appellate court became final, a motion to certify a new mandatory class action was filed. The motion proposed that this Court, in order to be consistent with the majority holding of the appellate court, recertify the issues certified in January and then exclude from membership in the Class those victims who had filed suit in state court. Oral arguments were heard on that motion in August. During the arguments this Court voiced some reservation about recertifying a mandatory class action which permitted some victims, but not all victims, to circumvent membership. Though the narrow language of the appellate court decision seemingly sanctions a mandatory class which excludes from class membership those victims who have filed cases in state court, an order fashioning a new mandatory class in accordance with the directives of the appellate court majority would be unprincipled. This Court cannot, in good conscience, certify a mandatory class action where the membership of class is governed by the fortuitous circumstance of having rushed to a courthouse to file suit.

The Court, still faced with the same concerns which were not resolved by the appellate court opinion, issued a show cause order directing interested parties to brief the issue of whether or not a voluntary class action under Rule 23(b)(3) would be proper in light of the unfolding circumstances of this case.[8] The Court additionally ordered discovery to be completed by November, 1982, and

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[8] In its memorandum of August 23, 1982, in response to the show cause order, defendant Hyatt Corporation added a conclusory diatribe which was concerned generally with the "overloaded and overworked" federal court system and which inquired about why this Court would want to undertake a burden which it could easily ignore. To the extent that the Hyatt Corporation is asking this Court to leave those plaintiffs who have chosen a federal forum without a meaningful remedy or to cease handling diversity cases, no response is necessary. To the extent that its conclusion is a veiled motion to disqualify, the motion is denied.

set the trial of the skywalk collapse for January 10, 1983. After the show cause order issued, a motion was filed requesting the Court to certify a Rule 23(b)(3) class action. A hearing was held on September 13, 1982 to determine the propriety of a voluntary class action. From the arguments presented at that hearing, it became apparent that no person, whose citizenship was wholly diverse from all defendants, was willing to represent the Class.[9] The Court was informed that the prior representative, Mrs. Shirley Stover and her children, had settled their cases for a reported sum in excess of 10 million dollars just prior to the hearing. Discovery is presently being conducted for the purpose of ascertaining the propriety of the alleged settlement figure.

The Court is not now inclined to certify any class action where all defendants cannot be joined and where few victims have come forward in support of one. The Court will, therefore, consolidate the cases pending before it. They will be tried beginning on January 10, 1983. Though the defendants have opposed this Court's attempts to accommodate their contention that they can only be liable, if at all, for one punitive award, this Court, nonetheless, is inclined to find that only one punitive damage recovery,[10] reflecting the totality of any punishable conduct, will be permitted at a consolidated trial. That award could be divided among the consolidated plaintiffs.

The plaintiffs, who have filed in state court, have vigorously insisted that Missouri law permits undiminished multiple punitive damage awards. They may con-

[9] Approximately 54 wrongful death claims have not been filed or settled. The position of these claimants with respect to an opt-out class is not known.

[10] This includes any award for aggravating circumstances if a wrongful death claim is present.

tinue to press that contention in state court since the state court will be in a position to ultimately resolve the issue. After the state court has resolved the question, the state court's ruling would serve to guide this Court in any federal court cases which might be subsequently filed. If a plaintiff who has filed in state court and who has complete diversity with respect to the defendants is not assured that Missouri law provides for undiminished multiple punitive damage awards, that plaintiff may come forward and move for an opt-out class action as envisioned by the dissent of Judge Heaney or ask to have his or her case consolidated with cases in this Court.

Accordingly, it is hereby

ORDERED that the plaintiff's motions to certify a modified Rule 23(b)(1) or a Rule 23(b)(3) Class action are denied. It is further

ORDERED that the federal skywalk cases are consolidated for discovery and trial. It is further

ORDERED that consolidated discovery be completed by November 15, 1982.

It is further

ORDERED that all parties submit their proposed voir dire questions and jury instructions, exhibit and witness lists, and briefs on controverted matters by December 10, 1982. It is further

ORDERED that the consolidated trial will commence on January 10, 1983.

SCOTT O. WRIGHT
United States District Judge

Kansas City, Mo.
September 17, 1982.

APPENDIX B

IN THE

Circuit Court of Jackson County, Missouri

Case No. CV81-15244
MCF Civil Docket "I"

IN RE SKYWALK CASES

ORDER

Upon motion of Plaintiffs' Liaison Committee and for good cause shown,

IT IS HEREBY ORDERED that trial is set for March 14, 1983 for all personal injury and wrongful death actions arising out of the collapse of the skywalks at the Kansas City Hyatt Regency Hotel on July 17, 1981, which have been filed in the Circuit Court of Jackson County, Missouri.

IT IS FURTHER ORDERED that all personal injury and wrongful death actions arising out of the collapse of the skywalks at the Kansas City Hyatt Regency Hotel on July 17, 1981 which are still pending on March 14, 1983 shall be consolidated for trial on the issues of the liability of defendants for actual and punitive damages.

JUDGE TIMOTHY D. O'LEARY
Circuit Court Judge

Kansas City, Missouri
Dated: September 9, 1982

Office - Supreme Court, U.S.
FILED
OCT
ALEXANDER L. STEVAS,
CLERK

No. 82-217

In the Supreme Court of the United States

October Term, 1982

SHIRLEY STOVER, et al.,

Petitioners,

v.

MELANIE HANSON JOHNSON, GERARD STANLEY JOHNSON, et al., and JACQUELINE N. RAU,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This is an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1). The questions presented are:

1. Is the district court's order expressly prohibiting respondent and all other members of the putative mandatory class from settling or prosecuting their pending state court claims for punitive damages an injunction from which an appeal may be taken under 28 U.S.C. § 1292(a)(1)?

2. Is the district court's order expressly prohibiting respondent and all other members of the putative mandatory class from settling or prosecuting their state court claims for punitive damages an injunction to stay proceedings in a state court that contravenes the Anti-Injunction Act, 28 U.S.C. § 2283?

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-217

SHIRLEY STOVER, et al.,

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v.

MELANIE HANSON JOHNSON, GERARD STANLEY JOHNSON, et al., and JACQUELINE N. RAU,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

Respondent, Jacqueline N. Rau, requests that this Court deny the petition of Shirley Stover, *et al.*, for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

On January 25, 1982, the district court, Honorable Scott O. Wright presiding, entered the order from which respondent, Jacqueline N. Rau, appealed. Pet. App. D; *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo. 1982). Petitioners' repeated statement, Pet. 5, 8, that the district court did not issue any injunction is flatly incorrect. At no point do petitioners even mention the central language of this order—the district court's express injunction against settlement or prosecution by individual plaintiffs of their state court claims for punitive damages. In its order, the district court stated:

> Those claimants who want to exact payment for allegedly punishable acts must forego the settlement process and await the trial of the punitive damage issues.

Pet. App. D, 60a; 93 F.R.D. at 428. Even Judge Heaney, who dissented from the decision of the Eighth Circuit, acknowledged that this aspect of the district court's order constituted an express injunction appealable under 28 U.S.C. § 1292(a)(1). Pet. App. A, 19a-20a, 34a n.16-17; *In re Federal Skywalk Cases*, 680 F.2d 1175, 1185, 1192 n.16-17 (8th Cir. 1982).

The district court's order did, in fact, halt settlement negotiations in the state court proceedings. Prior to the order, defendants committed a minimum of 151 million dollars in insurance coverage to settle claims. J. App. Ex. 12, 53.* As of the date of the order, 123 claims had been

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* The citation "J. App. Ex." refers to the appendix filed by respondents Melanie Hanson Johnson and Gerard Stanley Johnson in the United States Court of Appeals for the Eighth Circuit.

settled for approximately 18.5 million dollars. Pet. App. A, 3a; 680 F.2d at 1177 n.5.

In her state court cases, Ms. Rau, whose husband was killed and who was injured herself when the skywalks collapsed, made a detailed written settlement demand to defendants. Counsel for Ms. Rau and defendants met during December, 1981. These negotiations were moving forward until the district court entered its order. Defense counsel thereupon terminated the settlement discussions with Ms. Rau. Understandably, defendants were unwilling to settle with Ms. Rau unless they could obtain a release of all of her claims, including her claims for punitive damages. Affidavit of Thomas P. Sullivan, attached hereto as Appendix A (hereinafter "R. App. A.").

On February 2, 1982, a week after the district court's order, counsel for several major defendants filed a notice that they would recommence settlement negotiations, but would "only settle such claims in return for a full release of all claims, including a waiver of any claim for punitive damages." J. App. Ex. 33, 1. On February 10, Petitioners filed a motion *in limine* in response to the defendants' notice in which petitioners themselves recognized the injunctive effect of the district court's order when they stated, J. App. Ex. 39, 2-3:

> The short answer to the defendants' Notice is that this Court's Order and Memorandum certifying the class forbids individual settlements of claims for punitive damages . . . . As the Court emphasized, settlements of punitive damage claims must be prohibited . . . .

No settlements were negotiated between January 25, 1982, the date of the district court's order, and June 7, 1982, the date of the Eighth Circuit's opinion vacating that order. Affidavit of Michael Waldeck, August 23, 1982,

at 1. Defendants declined even to discuss settlement with Ms. Rau. R. App. A.

In its opinion, the entire panel of the Eighth Circuit, including Judge Heaney, concluded that the district court's order "expressly prohibited members from settling their punitive damage claims." Pet. App. A, 9a, 19a; 680 F.2d at 1180, 1185 n.1. The majority also noted that "the substantial effect of the order . . . enjoined the state plaintiffs from pursuing their pending state court actions on the issues of liability for compensatory and punitive damages and the amount of punitive damages." Pet. App. A, 9a; 680 F.2d at 1180. On these facts, the Eighth Circuit held, with agreement from Judge Heaney in dissent, that the district court granted an injunction appealable under 28 U.S.C. §1292(a)(1). Pet. App. A, 10a, 19a-20a, 33a-34a; 680 F.2d at 1180, 1185, 1191-92 n.16.

The majority also held that the district court's injunction violated the Anti-Injunction Act, 28 U.S.C. § 2283. The majority expressly rejected petitioners' argument that the injunction was necessary in aid of the district court's jurisdiction so as to fall within that exception to the Anti-Injunction Act. Pet. App. A, 12a-16a; 680 F.2d at 1181-83.

Since the Eighth Circuit's decision, the effect of which this Court refused to stay, 47 additional cases have been settled for over 5 million dollars. Affidavit of Michael Waldeck, August 23, 1982, at 1. On August 18, 1982, counsel for Ms. Rau met with representatives of defendants and continued settlement negotiations. Since then, counsel for Ms. Rau and defendants have exchanged correspondence concerning the offer in an ongoing effort to settle her case. R. App. A. Indeed, even the sole representative plaintiff, petitioner Ms. Stover, was able to negotiate a substantial settlement of all of her claims shortly after the petition was filed with this Court. *In Re Federal Skywalk Cases*, No. 81-0945-A-CV-W-5 slip op. at 5 (W.D. Mo. Sept. 17, 1982).

REASONS FOR DENYING THE WRIT

The district court expressly prohibited class members from settling or prosecuting their state court claims for punitive damages. The entire panel of the Eighth Circuit agreed that the district court's order was appealable as of right because it had the substantial effect of an injunction against pending state court proceedings. By so ruling, the Eighth Circuit did not expand the scope of interlocutory orders appealable under 28 U.S.C. § 1292(a)(1). On Ms. Rau's proper appeal, the majority correctly vacated the district court's order because it constituted an injunction against state court proceedings that did not fall within any exception to the Anti-Injunction Act.

The petition should be denied not only because the decision below was clearly correct, but also because petitioners present no question which is important or which involves a conflict with any decision of this Court or among the circuits.

ARGUMENT

I.

THE DISTRICT COURT'S ORDER IS APPEALABLE UNDER 28 U.S.C. § 1292(a)(1).

Every member of the Eighth Circuit panel, including Judge Heaney in dissent, agreed that the district court's order expressly enjoined members of the putative class from settling their state court punitive damage claims. Pet. App. A, 9a, 19a-20a; 680 F.2d at 1180. Directly contrary to petitioner's contention, the majority held, and Judge Heaney agreed, that the district court's interlocutory injunction was appealable under 28 U.S.C. § 1292(a)(1). Pet. App. A, 9a-10a; 680 F.2d at 1180. Thus, the rec-

ord simply does not present the question posed by petitioners, *i.e.*, whether certification of a mandatory class *always* constitutes an injunction that is appealable as of right. For this reason alone, the petition should be denied. *Tyrrell* v. *District of Columbia*, 243 U.S. 1, 4 (1917).

Moreover, the Eighth Circuit's holding falls well within the bounds of precedent established by this Court and other circuit courts.* This Court has held that the determination of whether an order is an appealable injunction depends upon the substantial effect of the order rather than its terminology. *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U.S. 188, 191-92 (1942). An order which has the effect of enjoining or staying any proceeding before another court is appealable as of right under 28 U.S.C. § 1292(a)(1). *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775, 779 (3d Cir. 1975); *United States* v. *Dorgan*, 522 F.2d 969, 971 n.1 (8th Cir. 1975); *In re W. F. Hurley, Inc.*, 553 F.2d 1096, 1100-01 (8th Cir. 1977); *Codex Corp.* v. *Milgo Electronic Corp.*, 553 F.2d 735, 737 (1st Cir.), *cert. denied*, 434 U.S. 860 (1977); 9 *Moore's Federal Practice* ¶ 110.20[1] at 235 (1980). *See, General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430, 433 (1932); *Jenkins* v. *Blue Cross Mutual Hospital Ins., Inc.*, 538 F.2d 164, 166 n.2 (7th Cir.), *cert. denied*, 429 U.S. 986 (1976).

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* Petitioners assert that the Eighth Circuit's holding conflicts with *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978), and *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). The order at issue in *Gardner* only *denied* a motion for class certification; no injunction was issued. 437 U.S. at 479-80. In *Coopers & Lybrand*, again the order in dispute only *decertified* a class. This Court was solely concerned with the issue of whether an order decertifying a class was "final" under 28 U.S.C. § 1291 because of its alleged "death knell" effect. 437 U.S. at 464-66.

Indeed, this Court has held that a district court order rejecting a consent decree might have the "serious, perhaps irreparable, consequence" of denying parties their right to settle their dispute on mutually agreeable terms thus rendering the order appealable under 28 U.S.C. § 1292 (a)(1). *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 87-89 (1981). Here, the district court expressly prohibited the parties from litigating or settling their state court claims for punitive damages, and as a practical matter precluded them from settling at all.

II.

THE DISTRICT COURT'S ORDER CONTRAVENES THE ANTI-INJUNCTION ACT, 28 U.S.C. § 2283.

This Court has repeatedly held that the Anti-Injunction Act, 28 U.S.C. § 2283, constitutes an absolute prohibition against federal court injunctions of state court proceedings, absent the applicability of an enumerated exception, and that this prohibition applies if there is even any doubt as to the propriety of such an injunction. *Atlantic Coast Line R.R.* v. *Locomotive Engineers*, 398 U.S. 281, 286-87, 297 (1970), *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977). Thus, unless an enumerated exception applied, the Eighth Circuit's decision vacating the district court's order was mandated by the Anti-Injunction Act. Pet. App. 12a; 680 F.2d at 1182.

Petitioners claim that the district court's order was necessary in aid of its jurisdiction so that it falls within an exception to the Anti-Injunction Act. However, as the Eighth Circuit correctly pointed out, both the federal and the state court proceedings are *in personam* actions for money damages. In 1922, this Court held that a federal action brought to enforce a personal liability does not impair or defeat the jurisdiction of the state court in which a prior action for the same cause is pending. *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 230 (1922). This

opinion was recently reaffirmed by a plurality of this Court in *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 641-42 (1977). Thus, the state proceedings which the district court's order enjoined did not impair its jurisdiction over the class action and the district court's injunction was not necessary in aid of its jurisdiction.

Petitioners assert that this case is analogous to an interpleader proceeding under Fed.R.Civ.P. 22, a procedure often used by an insurer which concedes liability on a policy, deposits the proceeds with the Court and submits conflicting and mutually exclusive claims to the proceeds for resolution by the Court and claimants.* The Eighth Circuit soundly answered this argument in its opinion.

> The analogy is based on the premise that the possibility of defendants being required to pay only one punitive damage award is comparable to the limited fund concept underlying federal interpleader. That premise is erroneous. 'Federal interpleader jurisdiction de-

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* This analogy involves petitioners' claim that defendants lack sufficient assets to pay all the damages prayed for in the *ad damnums* of the victims. Petitioners' claim is based on an allegation of the Hyatt Corporation in a declaratory judgment suit that Hyatt brought against 26 insurance companies to determine the amount of its insurance coverage and the order of payment by various insurers. Pet. 3 n.4. Hyatt asserted that the aggregate compensatory and punitive damages *alleged* by plaintiffs exceeded all defendants' aggregate insurance coverage. Pet. 3. Petitioners have adduced no evidence that the *actual value* of plaintiffs' claims exceeds the defendants' combined insurance coverage of $333,000,000 and their assets, including the undisclosed assets of defendants Hyatt Corporation and Hallmark Cards. Petitioners have thus failed not only to justify the district court's injunction, but also to establish the existence of a limited fund that might support certification of a mandatory class action pursuant to Rule 23(b)(1)(B). *In Re: Northern District of California, Dalkon Shield IUD Products Liability Litigation*, Nos. 81-4648, 81-4649, 81-4650, 81-4651, 81-4652, 81-4653, 81-4654, 81-4655, 81-4656, slip op. 6-8 (9th Cir. June 18, 1982.)

> pends on identifiable property or a limited fund or pecuniary obligation, and it is not proper to predicate jurisdiction on the mere potential to recover damages for pecuniary injury.' *Murphy* v. *Travelers Insurance Co.*, 534 F.2d 1155, 1159 (5th Cir. 1976), *citing Wallach* v. *Cannon*, 357 F.2d 557 (8th Cir. 1966).
>
> In the present case the class has an uncertain claim for punitive damages against defendants who have not conceded liability. The claim does not qualify as a limited fund which is a jurisdictional prerequisite for federal interpleader. Without the limited fund there is no analogy to an interpleader and no reason to treat the class action as an interpleader for purposes of the Anti-Injunction Act.

Pet. App. A, 13a; 680 F.2d at 1182.

Because the district court's order does not fall within any exception to the Anti-Injunction Act, it was properly vacated by the Eighth Circuit.

CONCLUSION

Respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT OF THOMAS P. SULLIVAN

Thomas P. Sullivan, on oath, certifies that the matters contained on pages 3 to 4 of the attached brief are true.

.....
THOMAS P. SULLIVAN

Subscribed and Sworn to
before me this ..... day
of ...., 1982.

.....
Notary Public

Office - Supreme Court, U.S.
FILED
OCT 24 1992
ALEXANDER L. STEVAS,
CLERK

No. 92-647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SHIRLEY STOVER, *et al.*,
Petitioners

v.

MELANIE HANSON JOHNSON,
GERARD STANLEY JOHNSON, *et al.*, and
JACQUELINE N. RAU,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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with respect to all matters pertaining to class certification,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-217

SHIRLEY STOVER, *et al.*,
Petitioners

v.

MELANIE HANSON JOHNSON,
GERARD STANLEY JOHNSON, *et al.*, and
JACQUELINE N. RAU,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

Petitioners raise in their petition for certiorari two important questions of federal law decided by the Eighth Circuit, questions which should be answered by this Court. These questions are:

1. *Whether an order certifying a mandatory class under Fed. R. Civ. P. 23(b)(1) constitutes an injunction appealable as of right under 28 U.S.C. § 1292(a)(1).* As stated in the petition, the effect of the Eighth Circuit's ruling is to render not only all class certification orders immediately appealable, but to transform *any order* which may have a restrictive effect on a party's behavior into an injunction. Unless the Eighth Circuit is reversed, this Court's warnings against piecemeal review in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978) and *Gardner*

v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) will go unheeded and the final judgment rule will be undermined.

2. *Whether the Anti-Injunction Act, 28 U.S.C. § 2283, eliminates a district court's power to certify a mandatory class action once any member of the class has instituted state court proceedings.* The Eighth Circuit's decision virtually eliminates mandatory class actions since even *one* member of a class, by a rush to the state courthouse, can strip a federal court of the power to certify a mandatory class, no matter how necessary or desirable it would be to join all class members in one proceeding. If mandatory classes are to be thus emasculated, it is this Court which should so decide.

In opposition, respondents Crown Center Redevelopment Corp. and Hallmark Cards, Inc.,[1] Jacqueline N. Rau, and Melanie Hanson Johnson and Gerard Stanley Johnson, *et al.*, make several contentions, not one of which diminishes the importance of the questions petitioners have raised.

A. In an attempt to minimize the impact of the Eighth Circuit's ruling that the District Court's entire certification order constituted an injunction, respondents claim that the panel held only that one sentence in the District Court's order constituted the forbidden injunction. This is simply not so. The language of the majority opinion clearly indicates that the court found the *entire* certification order to be an injunction.

B. Respondents downplay the effects of the Eighth Circuit's ruling on Rule 23, denominating the case "fact-specific." To the contrary, the particular facts concerning this controversy are irrelevant to the force of the Eighth

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[1] Although Crown Center Redevelopment Corp. and Hallmark Cards, Inc. have chosen to designate themselves as respondents, the Eighth Circuit denominated them as *amici curiae*. Pet. A.2a n.3.

Circuit's ruling on mandatory class actions. As a result of the panel's decision, virtually every mandatory class will be thwarted by the simple expedient of having one class member file suit in state court.

C. Respondents have revived all the arguments they presented with much vigor before the Eighth Circuit regarding the propriety of the District Court's certification order under Fed. R. Civ. P. 23. The Eighth Circuit, having reviewed the arguments, choose not to disturb the District Court's findings; indeed, it commended the court for its "carefully reasoned" order. There is thus no reason for this Court to consider arguments which the Eighth Circuit clearly felt had no merit.

D. Respondent Rau has urged that the settlement of Mrs. Stover's claim renders the case moot. Nothing is farther from the truth. The issues raised in this case are more sharply presented than ever, given the imminence of trials in both the state and federal courts. And there can be no question that Mrs. Stover not only wishes to, but has the standing to pursue her petition for certiorari.

ARGUMENT

I. Respondents Misstate the Holding of the Eighth Circuit. That Court Held that the District Court's Certification of a Mandatory Class Constituted an Injunction Appealable as of Right Under 28 U.S.C. Section 1292

The respondents attempt to minimize the importance of the Eighth Circuit's ruling by misstating its scope. They claim that the Eighth Circuit held only that the District Court's alleged prohibition against the settlement of punitive damage claims, not the certification order itself, constituted an injunction, appealable as of right. The language of the Eighth Circuit's opinion clearly indicates otherwise:

> the substantial effect of the [certification] order also enjoined the State plaintiffs from bringing their

> pending state court actions . . . . Appendix to Petition for Writ of Certiorari (hereinafter "Pet. A.") at 9a.

To call the District Court's certification of a mandatory class an injunction, as the Eighth Circuit did, does violence both to the facts of this case and to the final judgment rule enunciated by this Court. That is why the respondents distort the Eighth Circuit's opinion.

At no time did either the respondents or the state court interpret the District Court's order as an injunction. The respondents were not held back; they *chose* not to proceed with their state court actions. *See*, Respondent Johnson Appendix to Brief in Opposition (hereinafter, Res.J.A.) at 4a.

Indeed, counsel for respondent Johnson openly declared in state court on July 11, 1982 that the state proceedings had not been enjoined: "This Court has not been enjoined, these proceedings have not been stayed . . . ." [2]

The District Court never specifically enjoined the respondents. There was no order stopping settlement of punitive damage claims [3] and no order stopping the state court proceedings. The certification of a mandatory class thus did not enjoin the respondents. At most it dampened their zeal to go forward with the state court actions. To label this effect an injunction, as the Eighth Circuit did, is to stretch the meaning of injunction to its limits and to make appealable as of right any court order that restricts a party's behavior or decreases the desirability of a particular course of action.

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[2] Transcript of proceedings before Hon. Timothy D. O'Leary, Circuit Court of Jackson County, Missouri, July 1, 1982.

[3] Indeed, in an order dated March 2, 1982, Judge Wright explicitly stated that the Court "strongly encourages the continued settlement of legitimate damage claims" and that "the decision to continue settlement negotiations with individual named members of the class rests wholly with the defendants."

This Court said just the opposite in *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978). It warned that orders which have "a significant effect on the litigation . . . are not for that reason converted into injunctions." *Id.* at 481. But if the Eighth Circuit's opinion is left standing, litigants whose conduct has been restricted will cite the opinion and recast orders into injunctions, appealable as of right. The final judgment rule will be corroded by an all-encompassing definition of injunction—a definition totally at odds with this Court's statement that injunctions do not include "orders that have no direct or irreparable impact on the merits of the controversy." *Id.* at 482.

II. Respondents Attempt to Minimize the Impact the Eighth Circuit's Ruling Will Have on the Administration of Fed. R. Civ. P. 23

Respondents wish to paint this case as *sui generis* and argue that the Eighth Circuit's decision will thus affect very few cases. Wishing cannot make it so.

First, it is irrelevant for purposes of the impact of the Eighth Circuit's ruling that more state than federal cases were filed. If the Eighth Circuit's ruling survives, *one member* of a class has the power to prevent a mandatory class action by commencing his state court suit before the certification order issues.

It is equally irrelevant that this certification order issued in a mass disaster case. The Eighth Circuit's ruling would apply to *every* mandatory class action authorized by Rule 23, except in the rare instance where the federal court has been given exclusive federal jurisdiction.

The Eighth Circuit's opinion would indeed eviscerate virtually all mandatory class actions in the federal court, making them depend for their existence on whether or not a rush to the state courthouse preceded certification.

III. Respondents Misunderstand the "In Aid of" Exception to the Anti-Injunction Act

Respondents apparently misunderstand petitioner's argument that the certification of a mandatory class action to protect a limited fund "is necessary in aid of" the federal court's jurisdiction. It is petitioner's position that the certification of a mandatory federal class does *not* enjoin simultaneous state court actions. However, if one accepts the Eighth Circuit's view, then the certification order must be "in aid of" the federal court's jurisdiction. If not, the mandatory class under Fed. R. Civ. P. 23 is a dead letter.[4]

IV. Although the Eighth Circuit did not Disturb the District Court's Findings that Certification was Proper, Respondents Wish to Relitigate It Here

Respondents want to relitigate the findings of the District Court that certification in this case was appropriate, findings which the Eighth Circuit did not disturb although the issues were raised and fully briefed. Indeed, the panel commended Judge Wright on his "carefully reasoned" order. Since the certification order itself was clearly not one the Eighth Circuit felt needed correction, there is no need for this Court to consider it.[5]

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[4] Contrary to respondents' view, there is no issue here as to whether a federal court would have the power to issue an express injunction prohibiting state court plaintiffs from proceeding *after* the certification order has been entered. It need only decide that the court be permitted to enter the order that Fed. R. Civ. P. 23 authorizes—an order certifying a mandatory class action. That is what distinguishes this case from *In re Glenn W. Turner Enterprises Litigation*, 521 F.2d 775 (3d Cir. 1975). That case involved an *express injunction* against state court proceedings in addition to the certification order.

[5] For a further discussion of these issues, see Respondent Stover's Brief In Opposition to the Conditional Cross-petitions of Crown Center Redevelopment Corporation and Hallmark Cards, Incorporated, Jacqueline N. Rau, and Melanie Hanson Johnson and Gerard Stanley Johnson, et al.

V. Respondents Say this Case is Moot

This is simply not so. Although the District Court has held a hearing on a settlement proposal for Mrs. Stover's case, it has not yet approved it. Even if the settlement is approved, there can be no question that Mrs. Stover has the right to proceed with her petition and she has reaffirmed her willingness to do so both at the hearing held by the District Court and in a subsequent pleading. As this Court explained in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980), a settling class representative has an interest in the litigation beyond his or her individual claim. Here, as in *Roper*, Mrs. Stover retains a continuing interest in the class should the Eighth Circuit be reversed by this Court and the class action proceed to a successful conclusion. *Roper*, 445 U.S. at 336. In addition, Mrs. Stover, like the class representative whose individual claim was mooted in *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980), retains a "personal stake" in the outcome of the litigation. Whether or not she settles her *individual* claim for damages, she may proceed on her other claims that the certification of a mandatory class was proper and did not violate the Anti-Injunction Act. *Geraghty*, 445 U.S. at 402-07.[6]

A second charge respondents make is that petitioner "abandoned" the class certified on January 25, 1982 when she sought certification of another class. This is without foundation. Petitioner sought certification of another mandatory class modified to exclude those state court plaintiffs who had filed before the District Court entered a new certification order. Later, petitioner moved in the

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[6] Should there be a doubt, however, there are at least two other federal court plaintiffs who are willing and able to intervene in these proceedings. *See, United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 393-95 (1977); *see also, Rogers* v. *Paul*, 382 U.S. 198, 199 (1965); *Mullaney* v. *Anderson*, 342 U.S. 415, 416-17 (1952).

alternative for a Rule 23(b)(3) "opt out" class. Both proposals were expressly stated to be *conditioned upon the results of a decision from this Court.* In her briefs, petitioner stressed that if the Eighth Circuit were reversed, the District Court should reinstate the original class in accordance with this Court's directives.[7]

Contrary to respondents' assertions, this case is far from over. The remaining cases in state court have a trial date set for March, 1983—and the state plaintiffs have indicated their continuing desire to prosecute their punitive damage claims. Unless the hundreds of class members[8] are protected by the creation of a mandatory class, any distribution of punitive damage awards will not be made according to principles of equity, but in a race to judgment by a handful. Only this Court can prevent that injustice and keep intact both Rule 23 and the final judgment rule.

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[7] *See,* Memorandum In Support of Plaintiffs' Motion to Modify Plaintiffs' Class filed July 1, 1982; Plaintiffs' Reply To Defendants' and Plaintiff-Intervenors' Suggestions In Opposition To Certification Of A Class Action, filed September 9, 1982.

[8] Respondents erroneously claim that only two class members support the class. Since no notice has been sent to the over 700 identified class members, it is impossible to say how many support the class action. However, the District Court recently indicated at a hearing that several class members had written to him asking that he protect their interests. Class counsel have also received such letters. Lastly, two class members have requested the certification of a new class with themselves as class representatives.

CONCLUSION

Petitioners Shirley Stover and the class respectfully request that their petition for certiorari be granted.

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